No. 93-1525

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOINT APPENDIX
(Pages J.A. 1 to 199)

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JOINT APPENDIX
TABLE OF CONTENTS

	PAGE
Relevant Docket Entries	1
Affidavit of Michael Lebron, dated December 29, 1992	8
Declaration of Anthony D. DeAngelo, dated December 31, 1992	15
Anthony D. DeAngelo (January 7, 1993; January 23, 1993)	17
Michael J. Gallagher (January 13, 1993)	83
Bruce M. Bourque (January 14, 1993)	102
Defendant Amtrak's Proposed Findings of Fact, including Plaintiff's Annotated Response to Findings, ¶ 1-28	133
Plaintiff's Pre-Trial Proposed Findings of Fact including Defendants' Joint Annotated Response to Findings, ¶ 1-209 (Supplemental Exhibit)	149

The following opinions and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

	PAGE
Opinion of the United States Court of Appeals for the Second Circuit, dated December 27, 1993	1a
Opinion and Order of the United States District Court for the Southern District of New York, dated February 5, 1993	1b
Order of the United States Court of Appeals for the Second Circuit, filed December 27, 1993	1c

RELEVANT DOCKET ENTRIES

12/30/92	1	COMPLAINT filed; Summons issued and Notice pursuant to 28 U.S.C. 636(c); FILING FEE $120.00 RECEIPT #182917 (do) [Entry date 01/04/93]
1/21/93	13	ANSWER to Complaint by The National Railroa (Attorney Mark S. Landman), ; Firm of: SR by attorney Mark S. Landman for defendant The National Railroa (mk) [Entry date 01/22/93]
1/26/93	19	Findings of Fact by Defendant, The National Railroad Passenger Corporation (Amtrak). (jr)
1/28/93	21	PLAINTIFF MICHAEL LEBRON'S PRETRIAL PROPOSED FINDINGS OF FACT (jr)
1/28/93	22	PLAINTIFF MICHAEL LEBRON'S PRETRIAL PORPOSED CONCLUSIONS OF LAW. (jr)
2/5/93	23	STIPULATION AND ORDER, that because all claims, including TDI's counterclaim, have been tried and submitted to the Court, no reply to TDI's counterclaim is necessary (signed by Judge Pierre N. Leval). (jr)
2/5/93	25	OPINION AND ORDER (FINDINGS OF FACT AND CONCLUSIONS OF LAW) #71031, Plaintiff Lebron has convincingly demonstrated that in rejecting his contract to display his art on its billboard Amtrak was engaged in governmental action and that the standards employed by Amtrak in rejecting his work violated its obligations under the First Amendment. Defendants are accordingly directed to give plaintiff immediate access to the Spectacular in accordance with his contract (Signed by Judge Pierre N. Leval); Copies mailed. (jr) [Entry date 02/09/93]

2/8/93	24	ORDER, amending the Opinion and Order dated February 5, 1993, adding the following as a footnote at the end of the first full paragraph on page 27 (signed by Judge Pierre N. Leval); Copies mailed (jr) [Entry date 02/09/93]
2/9/93	26	ORDER, amending page 2 of the Opinion dated 2/5/93 to replace "Howard M. Spiro" with "Edward M. Spiro" and adding "David M. Kohane" after "Edward M. Spiro" on page 4, line 24 and replacing "$16,500" with "$18,500." (signed by Judge Pierre N. Leval); Copies mailed (jr) [Entry date 02/10/93]
2/10/93	32	ORDER, denying Amtrak's application to stay the district court's injunction pending appeal, and granting Amtrak's application for a brief stay to permit it to seek a stay in the Court of Appeals (signed by Judge Pierre N. Leval); Copies mailed (jr) [Entry date 02/11/93]
2/10/93	33	Filed Memo-Endorsement on letter from Edward M. Spiro to Judge Leval dated February 10, 1993, The motion to delete the first paragraph of the Judgment insofar as it names the defendant TDI is granted (signed by Judge Pierre N. Leval) (jr) [Entry date 02/11/93]
2/10/93	39	JUDGMENT # for Michael Lebron against The National Railroa, Transportation Displ, awarding Lebron costs (signed by Judge Pierre N. Leval); Mailed copies and notice of right to appeal. (E.O.D. 2/11/93). (jr) [Entry date 02/11/93]
2/10/93	40	NOTICE OF APPEAL by The National Railroa ; from [25-1] order Plaintiff Lebron has convincingly demonstrated that in rejecting his contract to display his art on its billboard

Amtrak was engaged in governmental action and that the standards employed by Amtrak in rejecting his work violated its obligations under the First Amendment. Defendants are accordingly directed to give plaintiff immediate access to the Spectacular in accordance with his contract, [39-1] judgment order. Copies of notice of appeal mailed to Attorney(s) of Record: R. Bruce Rich, Mark S. Landman, Edward M. Spiro . (em) [Entry date 02/11/93]

2/11/93	—	Notice of appeal and certified copy of docket to USCA: [40-1] appeal by The National Railroad ; Copy of notice of appeal sent to District Judge. (em)
2/16/93	41	RESPONSE by Michael Lebron Re: [19-1] Defendant's Findings of Fact #1- 28. (jr) [Entry date 02/17/93]
2/16/93	42	PRE-TRIAL PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW by Plaintiff Michael A. Lebron. (jr) [Entry date 02/17/93]
2/26/93	47	MANDATE OF USCA (certified copy) Re: Appeal by Amtrak, No. 93-7127. Appellant's notice of motion for expedited consideration is granted. A scheduling order will issue. (Elaine B. Goldsmith, Clerk). E.O.D. 3/3/93. (jr) [Entry date 03/03/93]
3/2/93	46	Notice that the original record on appeal has been certified and transmitted to the U.S. Court of Appeals: [40-1] appeal by The National Railroa (jr) [Entry date 03/03/93]
3/4/93	48	STIPULATION AND ORDER, that the following exhibits and deposition transcripts, which were not listed on the district court docket sheet but

were introduced as evidence at trial before the district court on 1/27/93, were to be made part of the district court record and deemed included as part of the record on the appeal to the Court of Appeals (signed by Judge Pierre N. Leval). Night Deposit on 3/4/93 at 4:47 p.m. (jr) [Entry date 03/11/93] [Edit date 03/11/93]

3/16/93 49 Notice that the first supplemental record on appeal has been certified and transmitted to the U.S. Court of Appeals: [40-1] appeal by The National Railroa (jr)

2/1/94 51 MANDATE OF USCA (certified copy, docketed as Judgment #94,0235) Remanding [40-1] appeal by The National Railroa to the US District court, SDNY. (George Lange, III, Clerk) E.O.D. 2/3/94. (jr) [Entry date 02/03/94] [Edit date 02/03/94]

2/11/93 Appellant NRPC motion for stay pending appeal, to expedite appeal, to file oversized memorandum of law FILED (w/pfs). [362079-3] Orig & 3cc's to CAL. 1cc in Acco (com)

2/18/93 Appellee Michael A. Lebron memorandum of law in opposition to motion for stay [362079-1] filed (w/pfs). (cal)

2/23/93 Order FILED GRANTING motion for stay [362079-1] by Appellant NRPC, endorsed on motion form dated 2/11/93., GRANTING motion to expedite appeal [362079-2] by Appellant NRPC, endorsed on motion form dated 2/11/93., GRANTING motion to file oversize memo [362079-3] by Appellant NRPC, endorsed on motion form dated 2/11/93. Further stating a scheduling order will issue filed. (JEL, JMMcL, CJJ, Duffy, DJ) (coj)

2/23/93 Certified copy of the order, dated February 23, 1993 issued to the district court. (coj)

2/25/93 Expedited scheduling order filed. Record on appeal is due on 3/4/93. Appellant's brief and appendix due on 3/18/93. Appellee's brief is due on 4/8/93. Appellant's reply brief is due on 4/15/93. Argument as early as the week of 4/26/93. (com)

3/17/93 Proposed for argument the week of 4/26/93. (car)

3/18/93 Appellant NRPC brief FILED with proof of service. (twd)

3/18/93 Appellant NRPC joint appendix filed w/pfs. Number of volumes: 2. (Vol.I = A1-A726, Vol.II = a727-End) (twd)

3/18/93 Appellant NRPC exhibits filed with proof of service. Number of volumes: 4. (twd)

3/25/93 Set for argument on 4/27/93 . [93-7127] (cao)

4/8/93 Appellee Michael A. Lebron motion to strike pages from joint appendix, to allow to file supplemental exhibits FILED (w/pfs). [380536-2] (org +3 to cal). (twn)

4/8/93 Appellee Michael A. Lebron papers supporting motion # [380536-1] by Appellee Michael A. Lebron, supporting motion # [380536-2] by Appellee Michael A. Lebron filed. (org +3 to cal). (twn)

4/8/93 Appellee Michael A. Lebron exhibits received. Number of volumes: one (org +4). Problem: motion pending for permission to file. (3 to cal). (twn)

4/8/93 Appellee Michael A. Lebron brief filed with proof of service. (twn)

4/15/93	Appellant NRPC reply brief filed with proof of service. Satisfy appellant's reply brief due. (twd)
4/15/93	Appellant NRPC affidavit, and memorandum of law in opposition to motion to allow [380536-2] (to CAL) filed (w/pfs). (twd)
4/16/93	Appellee Michael A. Lebron papers supporting motion # [380536-1] by Appellee Michael A. Lebron filed. (org +3 to cal). (twn)
4/27/93	Case heard before Newman, Mahoney, Lumbard, C.JJ. (TAPE: 192) (caw)
4/28/93	Appellee Michael A. Lebron 28(J) letter received. (twk)
4/29/93	Appellant NRPC 28(J) letter received. (twk)
5/21/93	Appellee Michael A. Lebron 28(J) letter received. (copies to panel) (twd)
6/8/93	Appellee Michael A. Lebron 28(J) letter received. (copies to Panel) (twk)
12/27/93	Judgmentof the district court is REVERSED & the case is REMANDED with the instruction to dismiss the complaint. At stated at oral argument, Lebron's motion to strike pages from the joint appendix and for double costs and attorney fees is denied; his motion to file a supplemental volume of exhibits is granted by published signed opinion filed. (JDM). (twd)
12/27/93	Judge Newman DISSENTING in a separate opinion filed. (twd)
12/27/93	Judgment filed. (twd)
12/27/93	Appellee Michael A. Lebron supplemental appendix filed with proof of service. (see opinion dated 12/27/93) (twd)

1/24/94	Judgment MANDATE ISSUED. (twn)
4/4/94	Notice of filing petition for writ of certiorari for Appellee Michael A. Lebron dated 3/28/94 filed. Supreme Ct#: 93-1525. (twd)
5/11/94	Record on appeal RETURNED to lower court. No. of volumes: 2 (ref)
5/31/94	Certified copy of Supreme Court order GRANTING petition for writ of certiorari [505140-1] by Appellee Michael A. Lebron, dated 5/23/94. (twd)

AFFIDAVIT OF MICHAEL LEBRON

MICHAEL A. LEBRON, being duly sworn, deposes and says:

1. I am the plaintiff in this action; I am a citizen and resident of New York City, New York. I submit this affidavit in support of the motion for a temporary restraining order and/or a preliminary injunction.

2. I am an artist. I concentrate on creating visual works of a social or political nature to be displayed in public places such as subways and transportation centers. An important goal of my artistic expression is to responsibly engage the public in important political or social issues, which I seek to achieve by placing my works in mass transit stations where I can reach a wide audience.

3. For example, shortly after the congressional Iran-Contra hearings in 1987, I installed in advertising space in the Washington, D.C. subway stations a series of 25 works comprised of drawings by different Nicaraguan children. These included photographs and texts describing the impact of the war in Nicaragua on the most helpless members of that society, its children.

4. In 1984, a political poster that I installed in the Washington, D.C. subway was the subject of a lawsuit, *Lebron* v. *Washington Area Metro. Area Transit Auth.*, 749 F.2d 893 (D.C. Cir. 1984), when a public transit authority tried to suppress it on the ground that it was "deceptive." The poster, which bore the caption "Tired of the Jellybean Republic?", was intended to convey my views about the way in which certain segments of the American population had reacted to the Reagan Administration. The court of appeals held that the refusal by the Washington Metropolitan Transit Authority to display the poster because of its content violated the First Amendment.

5. While my work achieves its full effect when exhibited in public places, some of my work has also been exhibited in galleries. Because of the social, political, and public nature of the work, however, it has been exhibited primarily in "alternative" or university galleries that are more likely to exhibit this kind of work. I have also exhibited my work in other countries. I currently have a piece in an exhibition inaugurated by the highly-regarded Camerawork gallery in London which is now traveling to other galleries in the British Isles.

6. Critics have agreed that my work is best suited to public spaces. As one critic noted, because my work "proposes an alternative rhetoric . . . (and) argues for more open public situations, it looks bright but stranded (in a gallery environment)—in cold storage as it were, pending delivery to (its) rightful context." Bill Berkson, art critic, *ARTFORUM* 1986 (attached as Exhibit A). In fact, the majority of curators in mainstream art institutions have declined to show my work, finding that it is too "utilitarian," or, even more bluntly, that "it looks like advertising." Therefore, the strategic logic of my work argues for independent production and promotion in the public places once associated with the town square, now more closely associated with the subway stations, bus shelters, airports, train terminals, shopping malls, etc. of our large, urban areas.

7. I became motivated to do the project that is the subject of this suit while watching the Iran-Contra hearings in the summer of 1987. I had just spent several weeks that spring in the Nicaraguan war zone doing research on another project. I followed with interest the testimonies of that summer, feeling outraged at what appeared to be a flagrant disregard for the law, and the apparent unwillingness of the investigating committee to aggressively pursue the matter. I noted with interest the testimonies of three private citizens, including Joe Coors, of whom I knew little at the time. I researched his background and decided to do a piece about it someday, feeling that there was an interesting story here that was being neglected by the press. I ride Amtrak often, and each time I walked past the Penn Station Spectacular, I visualized the form this work

would take. I knew I would be unable to raise money for this project, and undertook to save the $100,000 it would take to realize the creation and installation of this work in Penn Station. I interviewed professional photographers and hired one. In September 1991, we flew to Nicaragua to hire a theatre company and to scout for a location. In October 1991, we returned to Nicaragua to shoot the imagery needed for half the piece; the remaining photography was completed in Los Angeles and Baltimore. Electronic assembly was completed in New York. In all, over 100 people worked on the project.

8. The Penn Station Spectacular is a large, curved advertising display space located in Pennsylvania Station at the entry to the station measuring approximately 103 feet long by 10 feet high. The very size of the Spectacular allowed me to design and visualize this work with an effectiveness and clarity that would have been otherwise impossible to achieve. Its size and shape make it one of the largest advertising display spaces in New York City, and its prominent location in Pennsylvania Station means that it is visible to a large segment of the traveling public, providing an excellent opportunity to reach exactly the kind of audience I hope to engage with the subject matter of this piece. For all these reasons, I consider the space an extraordinarily unique advertising location in New York City, and a unique challenge to my communicative skills as an artist that no gallery and few other public environments could provide.

9. I have created a work that is designed to be displayed in the Penn Station Spectacular and in no other place. The specific object of the work is to draw attention to the connection between the profits of the Coors Brewing Company, of which all of the voting shares of stock are held by a Coors family trust, and the right-wing causes that the Coors family supports, either directly or through the Coors Foundation. The work attempts to expose the contradiction between the imagery of Coors corporate marketing and the social and political agenda that Coors family members seek to realize. In a general sense, the work is an allegory about the destructive influence of a powerful, urban, materialistic and individual-

istic culture on rural, community based, family-oriented and religious cultures.

10. The caption "IS IT THE RIGHT'S BEER NOW?" is a parodic play on the Coors beer advertising slogan. The caption appears over a photomontage that depicts on the left a group of young Americans partying, each holding a can of Coors beer and facing the right side of the photomontage, which displays Nicaraguans looking apprehensively in the direction of the American beer drinkers. Bridging the two "scenes" of the photomontage is a can of Coors beer with a comet tail shooting out behind, a parody of the Coors "silver bullet." The accompanying text connects the profits made by the Coors Brewing Company and its owners with the right-wing causes supported by Coors family members and the Coors Foundation. In particular, it mentions that Joseph Coors financed the purchase of an aircraft for the Nicaraguan contras.

11. In August of 1991, and again in May of 1992, I contacted TDI about leasing the Penn Station Spectacular. By July 31, 1992, Bill Schwartz, a TDI account executive and I had agreed upon the period of time that TDI would lease the space (January and February 1993) and the financial terms ($18,500 gross rent and maintenance). Because I was not leasing the space for a long period of time, the cost included a surcharge. On August 19, 1992, I signed and returned to Mr. Schwartz a standard form TDI contract that reflected these terms. Mr. Schwartz told me at the time that the contract was subject to the possibility that the existing lessee, the A&S department store, might renew its lease. He asked me what the work was about. I said that I didn't want to say at the time, except that it was political, and that it would look like a conventional ad. I asked him if there would be a problem with that. He stated that unless the work was sexually obscene or graphically violent, he saw no reason for the work to be rejected by the approval process.

12. Shortly before Thanksgiving, I met with Mr. Schwartz. He notified me that the Penn Station Spectacular would probably be available to me in accordance with the agreement we

had earlier discussed. Even if A&S wanted to renew its lease, TDI said that A&S was willing to be flexible and give me a 2-month contract before their renewal began. It is my understanding that, but for these two months, the Spectacular is leased to A&S on a long-term basis. At this meeting, I showed him copies of other works of mine. He stated that he had seen my work elsewhere and was familiar with it, and expressed excitement that what I was installing in the Spectacular was not merely reproductions of past works, but a new work designed specifically for the Spectacular. Shortly afterwards, he notified me that we had an agreement, and on November 30, 1992, TDI sent me a copy of the final contract with its signature (attached as Exhibit B).

13. In reliance on Mr. Schwartz's representations, I took steps in November to have a miniature version of the work and the accompanying text prepared for submission to TDI. Because the TDI contract states that "all advertising copy is subject to approval of TDI and [Amtrak] as to character, text, illustration, design and operation," I provided TDI a color photocopy of the work and the text for review on December 2, 1992.

14. In preparing this work, I considered it my responsibility to include only information that could be substantiated as true and factual in the public record. To substantiate my statements, I consulted reports and other printed materials, such as the annual report of the Coors Foundation, a report on The Coors Connection prepared by Russ Bellant for Political Research Associates, Joseph Coors's own testimony before a Senate investigating committee, and I.R.S. filings. I view this work as simply a "re-presentation" of information already on the public record, albeit with an artistic interpretation, a "re-presentation" that is designed to capture the public's imagination. The methods I use are similar to those employed by any professional commercial advertising agency, except that I hold myself to higher standards of accountability.

15. I do not seek to sell anything other than ideas with this advertisement. However, this project is an important part of

my work as a political artist. If defendants breach their contract with me and do not permit me to display the advertisement as contemplated in the contract, I will suffer significant injuries to my reputation as an artist, to my goal of disseminating the ideas in this work, and to my emotional well-being, which is highly invested in this work.

16. I consider this work a timely political statement, particularly in light of renewed interest in the Nicaraguan issue as a result of President Bush's pardon of several Iran-Contra figures. Any delay in displaying the work will cause irreparable injury to my ability to express my message in the way I contracted to do.

17. My contract with TDI requires me to provide durable transparencies (known as "duratrans") to TDI before the beginning of the contract period, which is January 1, 1993. There is only one photolab in New York City that is equipped to make a duratrans of this size, and it is the same lab that makes the duratrans for nearly all advertising displays that are intended for the Penn Station Spectacular. The photolab requires six days without overtime to make the duratrans. It could produce the duratrans in three days with 100% overtime, charged at double the regular rate plus additional overhead fees, but then I would have to bear the additional stress and expense. Since my contract period follows the Christmas holidays, I needed to have clearance from TDI by December 22, 1992, if the duratrans were to be produced without incurring any overtime expense.

18. In a December 7, 1992 letter, Tina Haut, TDI's general counsel, notified me that she was sending my materials to Amtrak for approval. I believe that my attorneys contacted Mr. Schwartz and/or Ms. Haut on December 4 and 7. I learned that Ms. Haut objected to my description of how the work was paid for, and I changed the copy to accommodate her objection.

19. Despite my need to have prompt notice of TDI's and Amtrak's comments before December 22 so as to meet my contract obligations without incurring any extra expense, and

despite my repeated efforts at contacting them to elicit a response, TDI failed to inform me of Amtrak's comments until 2:45 p.m. on December 29, 1992, when I learned for the first time that Amtrak had rejected my advertisement on the ground that it does not accept political advertising for the Spectacular.

20. I visited Penn Station on December 28, 1992, to see the types of advertisements defendants had accepted for the Spectacular and adjacent areas. In the area immediately in front of the Spectacular, I was interested to see prominent kiosk advertisements for *The Plain Truth* magazine, which is published by the controversial fundamentalist Worldwide Church of God. The display included bins containing free copies of the magazine, a copy of which is attached as Exhibit B hereto. The Worldwide Church of God is a small but well-known cultist organization founded by the late Herbert W. Armstrong, who I understand published a book about racial theology containing implicitly anti-semitic ideas.

The presence of these advertising displays demonstrates that Amtrak and TDI do accept ideological, non-commercial advertising.

/s/ MICHAEL A. LEBRON
Michael A. Lebron

Sworn to before me this
29th day of December, 1992

/s/ GLORIA C. PHARES
Notary Public

Gloria C. Phares
NOTARY PUBLIC State of New York
No. 31-4947843
Qualified in New York County
Commission Expires February 27, 1993

92 Civ. 9411 (CES)

DECLARATION OF ANTHONY D. DE ANGELO

Anthony D. DeAngelo deposes and says:

1. I am Vice President–Real Estate and Operations Development of the National Railroad Passenger Corporation ("Amtrak"). I have headed Amtrak's Real Estate Department since 1982, when I was appointed Amtrak's Assistant Vice President–Real Estate. I have held my present position since 1989.

2. Amtrak's Real Estate Department is responsible for the management and development of the railroad stations and other real property owned by Amtrak, including Penn Station in New York City. Since I became head of the Department in 1982, my responsibilities have included formulating and overseeing Amtrak's policies regarding the use of Amtrak-owned property for non-transportation purposes such as advertising.

3. Amtrak contracts with Transportation Displays Incorporated ("TDI") for the sale of advertising space in Penn Station. Among the spaces in Penn Station for which TDI sells advertising under its contract with Amtrak is the "Penn Station Spectacular" ("the Spectacular"). The Spectacular consists of a series of illuminated panels, approximately 103 feet long and 10 feet high, that are suspended from the ceiling of the main waiting room and are used for a single advertisement.

4. Amtrak's policy, which has been consistently observed during the ten years that I have headed the Real Estate Department, is that it will not permit the display of political advertisements, regardless of their content or viewpoint, on the Spectacular. This overwhelming structure is the first thing that many Amtrak passengers see when they enter Penn Station, and Amtrak does not want to require its passengers to view advertisements on the Spectacular that they may deem offensive or devisive. Amtrak is careful to ensure that that the

Spectacular is not used for, among other things, advertisements that are political, pornographic, or that are inimical to Amtrak's business interests (such as advertisements that promote the services of Amtrak's competitors).

5. Section 6 of Amtrak's contract with TDI, a copy of which is appended to my declaration as Exhibit A, provides that all advertising solicited by TDI is subject to Amtrak's approval. Pursuant to this provision, Amtrak requires TDI to submit for Amtrak's review and approval all advertisements proposed for the Spectacular in advance of their display.

6. On December 8, 1992, Amtrak's Real Estate Department received a letter from TDI, a copy of which is attached to my declaration as Exhibit B, to which was appended a proposed advertisement that a Mr. Lebron wished to display on the Spectacular. On December 23, 1992, the Real Estate Department sent a letter to TDI, a copy of which is appended to my declaration as Exhibit C, in which it advised TDI that Amtrak could not accept the proposed advertisement because of Amtrak's policy of not allowing political advertising on the Spectacular. This letter was signed on my behalf by John J. Turpin of the Real Estate Department, to whom I had delegated signature authority during my absence from the office.

I declare under penalty of perjury that the foregoing is true and correct. Dated December 31, 1992.

/s/ ANTHONY D. DEANGELO
Anthony D. DeAngelo

EXCERPTS FROM DEPOSITION TESTIMONY OF ANTHONY DEANGELO

Deposition of Anthony DeAngelo, taken on behalf of Plaintiff, held at the offices of Amtrak, 60 Massachusetts Avenue, N.E., Washington, D.C., commencing at 11:46 a.m., Thursday, January 7, 1993, before Mario A. Rodriguez, Notary Public, and continued on Saturday, January 23, 1993.

* * *

[8:2 - 13:25] A. I have.

Q. And so I can assume from that you are the vice president for real estate and operations development of the National Railroad Passenger Corporation?

A. That's correct.

Q. From hereon I am referring to that corporation as Amtrak.

A. Fine.

Q. And you've held that position or rather you have headed the real estate department since 1982?

A. Correct.

Q. And you were appointed Amtrak's assistant vice president for real estate in 1989?

A. No. No. Assistant vice president for real estate in 1982. In 1989, vice president of real estate and operations development.

Q. And what was added in 1989 was operations development?

A. Correct.

Q. What does that mean?

A. That means responsibility for profit making endeavors of the corporation outside of running the railroad.

Q. Can you give me an example of that?

A. Sure. Contract for running commuter trains for local commuter authorities. We run someone else's trains and we do that in order to make a profit.

Q. And when you mean commuter trains, you are distinguishing them from the railroad meaning the system operated by Amtrak?

A. I am.

Q. Okay. And can you tell me what is your responsibility under the part of your responsibilities that include real estate?

A. I have the top staff management position, in response for all policies and procedures dealing with Amtrak's real estate needs.

Q. And that includes Penn Station in New York?

A. Yes.

Q. Does it include Union Station in Washington?

A. It does to the extent it is our responsibility. There are certain portions that is not ours, but to the extent it is, I am responsible for it.

Q. What portions of Union Station are not under the contract?

MR. SLATTERY: Objection on relevance.

A. Retail space.

Q. And it is not Amtrak's responsibility because it has been let by Amtrak?

A. No. Amtrak does not own Union Station. It is owned by the federal government which leases it to Union Station Redevelopment Corporation which in turn leases it to LaSalle Partners which in turn subleases to a variety of people.

Q. I see. Does Amtrak own Pennsylvania Station?

A. Yes.

Q. When did it acquire Pennsylvania Station?

A. Prior to my tenure as vice president or assistant vice president, but it was acquired in 1976.

Q. 1976?

A. '76 or '77. I'm not exactly sure.

Q. And when you refer to Pennsylvania Station, what do you refer to? What are we describing?

A. The station.

Q. We're describing I take it in at least laymen's terms that portion of the property which is below the street level?

A. Yes. We own nothing above street level. That's correct.

Q. All right. Is there any part of the area below street level for which Amtrak is not responsible?

MR. SLATTERY: I think that is a little bit ambiguous. Answer the question.

A. We entered into a long-term lease, I think in 1986, with the Long Island Railroad where we leased them a major portion of what we call the A level of Penn Station. Although the lease is 100 something pages long, it in effect gave them control of that space so they control all activities that take place in that area.

Q. Are there any other portions of the station that you—

A. There is a whole series of leases, subleases and other arrangements. For example, we are required to provide space to New Jersey Transit under terms of other legal documents I'm not familiar with. We do provide such space and remuneration is not set by us, but by the federal government.

Q. When you say you are not familiar with the legal documents, do you have any idea what legal documents specify—

MR. SLATTERY: Objection. It calls for speculation.

BY MS. PHARES:

Q. I'm asking if you know what they are?

A. I don't know.

Q. Do you know who at Amtrak knows what they are?

A. Someone in our legal department, I assume.

Q. Is the area of Pennsylvania Station in which the New York subway system operates under the responsibility of Amtrak?

A. There is a variety of easements and cross easements and other legal arrangements that have been arranged over the years, but I'm not familiar with them. There remains questions exactly who has control over what when you get to some of the details, so there are a variety of arrangements.

Q. When you refer to "easements," are you referring to the track arrangements or station arrangements?

A. I'm referring to station.

Q. The station arrangements?

A. And access to subway, for example, in response to your previous question where they butt up against each other.

Q. You referred in your prior answer to remuneration that is set by the federal government. Do you know how the federal government sets that remuneration?

MR. SLATTERY: Objection. I don't recall that statement.

MS. PHARES: But the witness may answer.

MR. SLATTERY: Subject to my objection.

* * *

[15:2 - 18:25]provide it to us.

MR. SLATTERY: Your request for that is noted.

* * * INFORMATION REQUESTED TO-BE SUPPLIED:

MS. PHARES: All right. I'm going to ask the reporter if he would mark your drawing as Plaintiff's Exhibit 1, please.

(WITNESS' DRAWING MARKED PLAINTIFF'S EXHIBIT-NUMBER 1 FOR-IDENT.)

BY MS. PHARES:

Q. If you don't mind my asking you questions over your shoulder?

A. Sure.

Q. Would you just define your abbreviations on the exhibit.

A. MSG, Madison Square Garden, PPII is Penn Plaza II, an office building; B level, A level, track level.

Q. Now, can you describe what is on the B level?

A. Uh-huh. Primarily, Amtrak facilities including waiting area, ticket counters, restrooms, passenger baggage handling, et cetera, plus a number of retail stores.

Q. And is that also where the Penn Station Spectacular is located?

A. Yes.

Q. What is on the A level?

A. Primarily, commuter space used by Long Island Railroad and also by New Jersey Transit. A certain amount of retail as well.

Q. And I take it on what is designated as track level is just what it says?

A. Tracks, that's right.

Q. Is there some portion of your drawing in which the—where the subway appears?

A. No, not in my drawing.

Q. Is that because it is not part of Pennsylvania Station?

A. (Witness nodding.)

Q. So then your arrangements with regard to the subway refer to the easements you were describing earlier?

MR. SLATTERY: Objection to the extent it calls for a legal conclusion.

You can answer the question.

A. Well, there are subways at 7th and 8th Avenue which I have so indicated where the streets are located and people can walk, passengers from our station to the subway and vice versa. So there are clearly many areas of passageway between the two, but I have not shown it because they are not part of Pennsylvania Station.

Q. The passage ways are not part of Penn Station?

A. Up to a point. Beyond that, it is part of the city subway system.

Q. I see. Now, I sort of veered away where I had been before. I will probably return to your schematic.

A. Sure.

Q. To whom do you report?

A. Mr. William Norman, executive vice president.

Q. Who reports to you?

A. By name?

Q. No, generally.

A. All of the entire real estate and operations development department through a chain of command.

Q. Are they all located in Washington?

A. All save one who is in Chicago.

Q. And for how long have you been with Amtrak?

A. Since March 1 of 1982.
Q. And before that?
A. Immediately before?
Q. Have you been in the railroad business for a good deal of time?
A. No, this is my first exposure to the railroad business.
Q. What was your most immediate prior employment?
A. Deputy assistant secretary of commerce for economic development.
Q. And in that capacity, did you have any supervision of matters relating to railroads?
A. Supervision of what?
Q. Matters relating to railroads?
A. We had relationships on railroad matters, yes, and I would be involved in those.
Q. What were your responsibilities in that position?
A. Well, I was in charge of the program

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[20:2 - 33:25] the activities that were in connection with the establishment of Conrail?
A. No.
Q. Were any of them in connection with the Northeast Corridor?
A. To the extent the projects were located that I referred to previously in the Northeast Corridor, the answer is yes.
Q. Were any of the projects in the Northeast Corridor?
A. I'm sure they were. I don't recall.
Q. Now, you have been held out as familiar with the operations of Amtrak's board and I have several questions in connection with that.

MR. SLATTERY: Let me note for the record that we object to that characterization, but you can proceed.

BY MS. PHARES:

Q. Do you know how often the board meets?
A. I do.
Q. How often does it meet?
A. Generally speaking, once a month.

They do not meet the month of August, and the meetings in November and December are combined into one.
Q. How many board members are there?
A. Nine.
Q. How many of those nine if you know are appointed by the president?

MR. SLATTERY: Objection. I think we are getting a little far astray here from the issues in this case and to the extent you want to ask Mr. DeAngelo any questions about Amtrak's board, I would like to object on relevance grounds to that line of questioning, but permit you to proceed.

MS. PHARES: That's agreeable.

THE WITNESS: I'm not sure I know the answer to that question. I could speculate, but I'm not certain.

BY MS. PHARES:

Q. I don't want you to speculate. Does the board operate through any committees?
A. Yes.
Q. More than one?
A. Yes.
Q. Do you know how many?
A. Not precisely.
Q. Can you describe the committees or name the committee for me?
A. I can name several of them, the ones I have had occasion to deal with. The finance committee, consumer affairs committee, operations committee. There are others, but those are the three I've dealt with.
Q. Do you attend board meetings?
A. No.
Q. Do you report to any of the board committees?
A. Yes.
Q. Which ones?
A. Finance, operations and consumer affairs.
Q. I assume or you could correct me if I'm wrong that the board keeps minutes?
A. They do.

Q. Do the committees keep minutes?

A. They do.

Q. How often do the committees meet?

A. As often as the board meets.

Q. Of the three committees with which you are familiar, does any one of them have supervision of real estate?

A. You have to define what you mean by "supervision."

Q. That's not a good word. Actually, I was going to use something more general, more helpful. Is each of them concerned with Amtrak's real estate?

MR. SLATTERY: That's a little bit ambiguous, but you can answer the question.

A. To the extent when I appear in front of these three committees, I am presenting particular projects to them. I would be presenting it to them because they would be concerned with that type of project, so to that extent they are concerned.

Q. What does each of those committees do?

A. The finance committee is concerned with the financial matters of the corporation.

Q. Uh-huh.

A. The operations committee is concerned with the operational aspects of the corporation's functions and the consumer affairs is concerned with the consumer affairs part of the corporation.

Q. At least as a first glance it seemed to me there might be overlap between operational aspects and consumer affairs. Could you describe more particularly for me how they are different?

A. I can do that by illustration. Operational aspect, we would be concerned about on-time performance of the trains. Consumer affairs, we would be concerned about the quality of food on the trains. To give you two illustrations.

Q. So is it more likely that matters relating to the advertising policies or the free speech policies for Amtrak would come under the operations committee; is that correct?

MR. SLATTERY: I think that calls for speculation, but you can answer the question.

A. Well, I'll answer part of the question. The part that speaks to advertising, but not the rest of the question. On advertising, if any committee was to deal with it, it would be the finance committee.

Q. It would be the finance committee?

A. Uh-huh.

Q. Why is that?

A. Because we enter into advertising arrangements in order to make money for the corporation, therefore it is a financial issue.

Q. Do I understand from your prior answer you don't know under what committee Amtrak's free speech policy is dealt.

A. I'm not sure.

MS. WINKLER: That's assuming it is dealt with any committee. That is an assumption of a fact not in evidence.

MS. PHARES: Fair enough.

BY MS. PHARES:

Q. Are there particular actions of Amtrak that require board approval?

A. Yes, there are.

Q. What are they?

A. Well, there is a delegation of authority and I can speak to the real estate aspect to that.

Q. Would you please.

A. Any sale of our property must go in front of the board. Any lease or other arrangement with anyone above a certain dollar amount must go to the board. I can't tell you offhand that dollar amount.

Q. Anything else?

A. No.

Q. Are there any contracts that have to be approved by the board relating to the real estate?

A. The contracts are approved by me. What I do is go to the board with a—let's say it is a lease of a piece of property along a right of way. I will tend them that we intend to lease the property under certain conditions and they will approve that, but they will never see the contract or any of the details of the contract.

MR. SLATTERY: Can we go off the record for a second.
(Discussion off the record.)

BY MS. PHARES:

Q. What stations does Amtrak own along the Northeast Corridor?

MR. SLATTERY: I am going to object to inquiries of other stations on the grounds of relevance, but you can proceed.

A. I'll try to run south to north.

Q. Okay.

A. I believe I will be correct, but I reserve the right to make a mistake. BWI, Baltimore, Wilmington, Philadelphia; Penn Station, New York; Providence, Rhode Island.

Q. And does Amtrak arrange for the leasing of advertising space in those stations?

A. Yes.

Q. And am I correct that it does so through entities such as Transportation Displays Incorporated?

A. Yes.

Q. Does it—

A. Excuse me. There are a number of other stations that we own in the Northeast Corridor that are small tiny stations, many of them are leased to CEPTA, the Philadelphia commuter agency.

Q. Okay. Thank you. Does Amtrak itself directly let advertising space in any of its own stations?

A. No.

Q. And am I correct that in Pennsylvania Station, it lets advertising through TDI?

MR. KOHANE: Objection to form.

MR. SLATTERY: Objection to the extent it calls for a legal conclusion as to the relationship.

MR. KOHANE: And it assumes facts not in evidence.

THE WITNESS: I believe the answer is yes.

BY MS. PHARES:

Q. Does it lease advertising space in Penn Station through any other entity?

MR. SLATTERY: Same objection.

A. No. I believe the answer is no.

Q. Now, when was the what is referred to as the Penn Station Spectacular installed in Pennsylvania Station if you know?

A. Before my time.

Q. Before 1982?

A. (Witness nodding.) Yes.

Q. Who would know when it was installed?

A. It was prior to—I don't know.

Q. Do you know if it was prior to Amtrak's acquisition of Penn Station?

MR. SLATTERY: Objection. Lack of foundation.
You can answer the question.

A. I honestly—I think it was, but I do not know that.

Q. Fair enough. Does Amtrak lease the advertising space in the portion of Penn Station that Amtrak leases to the Long Island Railroad?

MR. SLATTERY: Objection. It calls for a legal conclusion.
You can answer that question.

A. No.

Q. Does Amtrak have any general standards regarding advertising?

MR. SLATTERY: Objection. Ambiguous.
You can answer it.

A. General standards. Could you explain what you mean by that?

Q. Does it have any general standards regarding what advertising it will accept?

MR. SLATTERY: Objection. Ambiguous.

A. I guess the answer is yes. If I understand where you are coming from, I think the answer is yes.

Q. What are those standards?

MR. SLATTERY: Objection. Ambiguous.
You can answer the question.

A. Our standards would call for things that are noncompetitive with our business interest, that are not pornographic,

and not objectionable to our riding public and others associated with us including political and other types of potentially controversial matters.

Q. When you said that your standards would call for, are those the standards?

A. Uh-huh, yes.

Q. Are they written?

A. No. Well, let me—not in the form I just read them to you, not as I just stated them to you.

Q. Are they written anywhere in any form?

MR. SLATTERY: Are we talking about any standards at any Amtrak station?

BY MS. PHARES:

Q. At any Amtrak station, to begin with.

A. For any advertisement?

Q. Right.

MR. SLATTERY: I'm going to object on relevance grounds, but you can answer the question.

A. The only standards that I'm aware of in writing would be those contained in the arrangements we have with TDI and there has been several of those over the years and it would be the language stated in there which we have and I do not believe they will be stated anyplace other than there. TDI and its predecessor.

Q. Is its predecessor named Winston-Salem?

A. Winston Network, I believe.

Q. Do these standards apply in all the owned stations that you described earlier?

MR. SLATTERY: Are you asking whether the TDI contract applies to all the owned stations?

BY MS. PHARES:

Q. No. I'm asking whether or not the standards that you just described, whether or not an advertisement was competitive with Amtrak or whether it was nonpornographic or objectionable to your riding public, do those standards apply in all of your stations.

MR. SLATTERY: Objection on the grounds of ambiguity.

A. Yes.

Q. Do they apply to billboards that are along the Amtrak right of way?

MR. SLATTERY: Objection. No foundation.

BY MS. PHARES:

Q. Are there billboards long the Amtrak right of way?

A. There are.

Q. Do the standards apply to those billboards?

MR. SLATTERY: Objection. Foundation.

A. Yes.

Q. Do those standards apply to the Pennsylvania Station Spectacular?

A. Yes.

MR. SLATTERY: Objection. Foundation.

BY MS. PHARES:

Q. Just talking about Penn Station alone, do I understand correctly, or correct me if I'm wrong, that there is a blanket policy against political advertising in all of Penn Station?

MR. SLATTERY: Objection. Ambiguous.

You can answer the question.

A. There is a policy, yeah.

Q. Now, how do you define political?

A. Mostly noncommercial.

Q. Well, let me give you an example. If you're provided with a—you may have seen a current Benneton ad, they sell clothing.

A. Right.

Q. That includes an oil laden duck, a

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[35:2 - 35:25] A. I'm not sure I would agree with that. I don't know.

Q. Well, if an advertisement regardless of what is in it, but if an advertisement purports to sell a product or services, then that's what you would describe as commercial?

A. Uh-huh.

Q. And everything else is political?

MR. SLATTERY: Objection. There is no foundation.
MS. PHARES: I'm just asking.

BY MS. PHARES:

Q. And then would you describe any other advertisement as political?

A. Potentially. I mean I can't answer it yes or no.

Q. When were the advertisement standards that you described earlier established?

A. In general?

Q. In general.

A. Well, prior to my arrival. And I couldn't be more specific than that.

Q. And you don't know who was responsible for them before your arrival?

* * *

[37:2 - 40:8] BY MS. PHARES:

Q. Now, what I don't remember, was there an answer to the question?

MR. SLATTERY: Maybe the court reporter can read that back.

MS. PHARES: I'll say it again.

BY MS. PHARES:

Q. Who told you about the standards?

A. I couldn't be specific about that.

MR. SLATTERY: We're talking about the standards to which Mr. DeAngelo testified earlier, is that my understanding?

MS. PHARES: That's correct.

MR. SLATTERY: Okay. That's fine.

BY MS. PHARES:

Q. Who decides whether or not an advertisement meets those standards?

A. I do after it goes through the staff process, but then I'll be the final authority for the corporation.

Q. And does anybody review those decisions after you've looked at them?

A. Not as a rule.

Q. Does anyone ever look at them after you do?

A. They never have, but, you know, I have a boss. He can review anything I do.

Q. To your knowledge, have the advertising standards ever been reviewed by anybody superior to you?

A. To my knowledge, they have never been other than me.

Q. By what authority do you exercise these advertising standards?

MR. SLATTERY: Anywhere on the Amtrak system now? We object on relevance grounds except to those relating to Penn Station.

A. My authority is the responsibility I have been given by the corporation to be in charge of all real estate activities for the corporation including among a lot of other things the advertising that we have in our stations along the right of way.

Q. Can you tell me particularly what the procedure is for the review of an advertisement within your department?

MR. SLATTERY: Are we talking about any advertisement now? You're assuming it's one procedure.

BY MS. PHARES:

Q. Is there one procedure?

A. No.

Q. How many different procedures are there?

A. I'm not sure. A number.

Q. What decides how an advertisement is reviewed?

A. Well, specifically, there is a different procedure for the Spectacular in Penn Station than there is for other types of advertisement.

Q. Is that procedure set out someplace?

A. It is.

Q. Where is it set out?

A. In the license—I believe it is a license agreement with TDI.

Q. Does TDI have a separate license agreement with the Penn Station Spectacular than it does for the rest of Penn Station?

MR. SLATTERY: Objection to the extent it calls for a legal conclusion.

A. I'm not certain. It has been treated differently over the years. I cannot speak as to the precise current legal arrangement. It has over time been spelled out in different terms.

Q. Has it been set out anywhere else?

A. Not to the best of my knowledge.

* * *

[41:2 - 44:8] of attorney-client privilege. I am going to instruct the witness not to answer.

BY MS. PHARES:

Q. Did you review any documents in connection with your preparation for your deposition?

MR. SLATTERY: You can answer the question.

A. Yes.

Q. All right. Let's take two examples. The review of an advertisement for the Penn Station Spectacular and then just for the Penn Station advertisement other than the Spectacular, and would you describe for me the chain of review.

A. Okay. Starting with the Spectacular?

Q. Yes.

A. TDI does its thing, whatever that is, and then they will communicate with a person on my staff.

Q. Is it always the same person?

A. It is. It's an individual named Bruce Bourque who is a project director for us and who is generally in charge of Penn Station real estate activities. It goes from Bruce through our departmental chain of command, Bruce reports to a Mr. Donald Prost who is the director of real estate development who in turn reports to me. Therefore, since our arrangements call for prior approval by Amtrak of all copy, whatever it says, something like that, for the Spectacular, it comes in from TDI to Bruce through the chain and eventually ends up on my desk for my signature.

Q. "Through the chain" meaning Mr. Prost?

A. Yes.

Q. And then to you?

A. That's right.

Q. How does the system differ for an advertisement anywhere else in Pennsylvania Station?

A. We do not call for prior approval for things other than the Spectacular. Spectacular is different from the rest.

Q. Is there any written material that accompanies the review of a Spectacular advertisement?

MS. WINKLER: When you say written material, what do you mean?

BY MS. PHARES:

Q. Comments, a signature page, is there a sign-off page? Are there comments made accompanying the report, any kind of document?

A. Well, there is not a formal or rigid process. Eventually it hits my desk and there is—I'm trying to think what accompanies it. I don't recall. We don't do many of these. The signs stay up there quite a while. It hits my desk and I say yea or nay. It may or may not even be a formal signature process.

Q. Well, do you have any way of knowing what the two people beneath you in the chain of command have thought about the advertisement?

A. Yes.

Q. How do you know that?

A. They tell me or give me a note one way or the other.

Q. And is the note ever extensive with their opinions or considerations with respect to taking the advertisement?

MR. SLATTERY: Objection. Ambiguous.

A. In regards to the Spectacular you're talking about?

Q. Yes.

A.I don't recall them ever being terribly extensive, no.

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[47:2 - 48:25] that correct?

A. No, I don't think it is correct. He obviously makes recommendations based on his own good judgment. He may in

fact have a personal view contrary to my views and he would probably express them, but I don't know how he arrives at a particular judgment. He's been in that—he's got 20 years of experience.

Q. So ultimately, the standard of whether or not an advertisement is approved just depends on the good common sense of you, Mr. Bourque and Mr. Frost?

MR. SLATTERY: Objection. It mischaracterizes the witness' testimony.

You can answer the question.

THE WITNESS: I forgot the question.

(The record was read as requested.)

THE WITNESS: Recommendations are made by Mr. Bourque through Mr. Prost to my desk. Ultimately I make the decision based on the policies that we have established and my judgment as to the applicability to those policies.

BY MS. PHARES:

Q. And when you say the policies that we have established, it's those standards that you described earlier; is that correct?

A. Yes.

Q. Those are indeed standards that were made before your time at Amtrak; is that correct?

A. Well, there were policies that were discussed that were in existence when I came and we have continued those policies, yes.

Q. Now, am I correct that you said earlier that other advertisements in Penn Station do not have to be approved?

A. No prior approval.

Q. No prior approval?

A. Yes.

Q. In other words, they may be disapproved after they are put up?

A. It's possible, yes.

Q. So the only advertisements that you approve beforehand for Penn Station are those in the Spectacular?

A. Correct.

Q. And how is your final decision documented?

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[50:3 - 50:11] Q. Have any of the standards or policies for advertising changed since you've—in the time you've been at Amtrak in the last ten years?

A. I don't think so, not that I can think of.

Q. The standards have been the same over that entire period?

A. I believe so.

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[55:2 - 57:25] it. Both.

Q. In those decisions that have reached you're desk, do you know of other rejections of Spectacular advertisements that were made before reaching your desk?

A. No.

Q. So that was just a manner of speaking?

A. Uh-huh.

Q. All right. Does anyone else in your department have the ultimate authority to reject a Spectacular advertisement?

A. Well, I have the ultimate authority. Only I unless I delegate that authority.

Q. Have you ever delegated it?

A. I have delegated my authority when I go out of town on all matters.

Q. And if the decision is made in your absence by your delegate, does the person reject the advertisement in his or her own name or in yours?

A. Mine.

Q. Were you the person ultimately responsible for the rejection of the advertisement in this case?

A. Yes, although the actual letter was signed by someone acting for me.

Q. So the fact that it was signed by someone else in this instance doesn't mean that you had delegated that authority in your absence?

A. Indeed. That's exactly what it means.

Q. You had delegated the authority to write the letter?

A. Right.

Q. Had you delegated the authority to make the decision?

A. I don't know how I can do one without doing the other. Of course.

Q. So a moment ago when you said you had the ultimate authority, you had the ultimate authority, but in this particular case it was exercised by someone else to whom you had delegated the authority; is that correct?

A. I had delegated authority for a particular period of time, a day or several days, whichever it was. During that time frame which is a written piece of paper which I prepare and sign, that individual whomever I name in that particular memo has full authority to act as if I was there and to act in my name, and he would always sign Mr. Smith for Mr. DeAngelo.

Q. Did you personally reject the ad that's involved in this case?

MR. SLATTERY: Ambiguous. Are you talking about whether he made the decision?

MS. PHARES: Yes.

THE WITNESS: Yes, I did

BY MS. PHARES:

Q. Do you apply any different advertising standards with respect to the Spectacular than you would apply if another advertisement were brought to your attention?

A. I think I have to give a more than one-word answer to that. The Spectacular is very large, very prominent, very visible to many people. Anything that goes on there has a very dominant position within the Penn Station and therefore within 38 percent of our passengers, and because of its size and it's brilliance in terms of candle power, it's something which we

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[59:20 - 62:3] Q. All right. Earlier you described one of the standards of the standards that you included as something that might be objectionable to your riding public. How is that defined?

A. It is not in writing. Is that the question?

Q. Well, you earlier told me it's not in writing. Do you have any guidance for interpreting whether or not an advertisement is objectionable to the riding public?

A. There is no written guidance, no.

Q. And what do you use for guidance when you are required to make a decision about an advertisement as to whether or not it is objectionable to the riding public?

A. I use several things. Before it reaches me, it would go through the staff and I'd have their views. It would reach my desk and I use my 40 years of experience to help make a judgment and if I didn't feel comfortable with doing that I would check with other people in the corporation whose views I would respect.

Q. With whom would you check?

A. It depends on the issue, but it could be anyone of 24,000, that's the number of people we employ.

Q. Would you refer a standard like that to the board of directors or to any—

A. (Witness shaking head.)

Q. No?

A. I'm not referring it to anybody. I'm merely in that particular illustration asking people's views.

Q. Well, you make the final decision about these advertisements. What does "objectionable to the riding public" mean to you?

A. Issues that would cause our passengers to be concerned and upset to write letters to us, to talk about it amongst themselves and things which they would find inappropriate for Amtrak to be a part of.

Q. And does it matter what proportion of the riding public might find an advertisement objectionable?

A. I don't know how I would know that.

Q. So if any member of the riding public might find an ad objectionable, is that grounds for rejection?

MR. SLATTERY: Any kind of ad now?

MS. PHARES: Yes, any kind of ad.

THE WITNESS: I mean my guess is, I could almost say anything like I want a turkey sandwich for lunch, and find

someone who doesn't think that is a good idea, so I would submit, no, the grounds for objection is my judgment as to the issue.

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[70:9 - 71:6] Q. Now, one thing I want to clarify. Aside from the prior approval issue for the Spectacular that you described earlier, are the standards for advertising the same for the Spectacular and other advertisements in Penn Station?

MR. KOHANE: I believe that's asked and answered, but go ahead.

MR. SLATTERY: I'm gong to make the same objection. You can answer the question.

THE WITNESS: Well, as I indicated earlier, the standards would be the same, but the Spectacular being the prominent brightly lit thing that it is gets much closer attention than do other things.

BY MS. PHARES:

Q. Do you mean by that there is a stricter standard of review for the Spectacular?

A. No, I mean by that it is a prior approval process and it's one which we take a close look at and look at very carefully.

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[76:2 - 78:25] whatever the case may be, and then appropriate actions be taken. Through that route, no one has ever come to me and said, This ad is anything.

Q. Now, given the standards that you had described earlier, does an advertisement that is objectionable to Amtrak's riding public include advertisements for religious organizations?

A. We would take exception to anything that was non-commercial.

Q. When you say you would "take exception to," what do you mean?

A. Well, if it was in the Spectacular where we had the right of prior approval, we would insist that we have a commercial message. That is, advertising, promoting a product or service.

Q. And what about elsewhere in Pennsylvania Station?

A. Well, that's where we don't have prior approval there.

Q. If an advertisement regarding a religious organization were brought to your attention, would that be grounds for removing it?

MR. SLATTERY: Objection. Ambiguous.

You can answer.

MS. PHARES: Let me rephrase it. I'll try again.

MR. SLATTERY: Sure.

BY MS. PHARES:

Q. If an advertisement is complained of on the grounds that it portrays a religious message, do you consider that grounds for removing it from Pennsylvania Station, a non-Spectacular ad?

A. That's never happened. I would have to review it when it happened.

Q. But if an advertisement has a religious message, but also purports to sell a product, then you consider that advertisement a commercial advertisement?

MR. SLATTERY: Objection. Ambiguous and it calls for speculation.

A. I would have to look at the circumstances. I can't answer.

Q. Do you know if there are advertisements in Pennsylvania Station which include as part of them material that is given away?

A. I believe they do.

Q. Are there any different standards for evaluating such advertisements?

MR. SLATTERY: Objection. Ambiguous.

You can answer.

A. Not that I'm aware of. We have never employed any.

Q. Would you accept an advertisement which relays a non-commercial message on behalf of a commercial advertiser?

MR. SLATTERY: Objection. It calls for speculation.

A. Yes, I agree, I wouldn't know how to answer that. I need to see it.

Q. Are you familiar with the Worldwide Church of God?

A. No.

Q. Are you aware that there is an advertisement for the Worldwide Church of God in Pennsylvania Station at the present time?

* * *

[81:19 - 82:12] MS. PHARES: All right. Now, I think what I would like to do is mark as Plaintiff's Exhibit Number 2 a station advertising agreement by and between National Railroad Passenger Corporation and Transportation Displays, Inc. dated March 15th, 1991.

(AGREEMENT BY AND BETWEEN NRPC AND TDI MARCH 15, 1991 MARKED PLAINTIFF'S EXHIBIT-NUMBER 2 FOR-IDENT.)

(Discussion off the record.)

BY MS. PHARES:

Q. Have you ever seen Plaintiff's Exhibit 2, Mr. DeAngelo?

A. I probably have. I say "probably" because it was signed for me by someone else, so I did not see it at that point in time, but typically when things are signed in my absence, I have a copy which I read on my return.

* * *

[86:16 - 88:24] Q. All right. Can you please point out to me in the contract the standards that you referred to earlier that you stated were in the TDI contract?

A. Well, give me a few minutes to read it.

Q. Certainly. Well, you stated earlier that the standards that you described—the only place they were set out were in the TDI contract; is that correct?

A. No, that's not correct.

Q. Are they set out someplace beside the TDI contract?

A. No, not to the best of my knowledge.

Q. Are you saying they are not set out in the TDI contract?

A. No, I have to read this particular contract, but what I did say earlier was TDI had arrangement for prior approval

of the the Spectacular, that's what I said. And we also had not just with Spectacular otherwise, that's what I'm looking for in here now, but we have the right, I believe, to reject.

Q. Well, let me refer you, if it helps you, to section 6 on page 4.

A. Oh. Thank you. Yeah, that's what I was looking for. Thank you. Exactly what I was looking for. That's what I was referring to.

Q. All right. You are referring particularly, am I correct, to the first two sentences of that section?

A. I am.

Q. And in those two sentences, I'm not trying to be tricky, I'm trying to save some time, that it says that "advertising material shall be subject to approval by Amtrak which may disapprove any such items at its own discretion," correct?

A. Correct.

Q. "And TDI will immediately remove at its sole expense upon the written demand of Amtrak any advertisement which may be considered objectionable by Amtrak."

A. That's right.

MR. KOHANE: The contract speaks for itself.

BY MS. PHARES:

Q. All right. Now, so far as you know, is any other standard for what is acceptable to Amtrak conveyed to TDI other than in this contract?

MR. SLATTERY: Objection. Ambiguous and no foundation.

BY MS. PHARES:

Q. You may answer witness.

A. I know of no other written communication of any kind.

* * *

[103:5 - 106:25] (IN-STATION ADVERTISING AGREEMENT DATED DECEMBER 1, 1985 MARKED PLAINTIFF'S EXHIBIT-NUMBER 3 FOR-IDENT.)

(PERMIT FOR ADVERTISING DISPLAY FACILITY DATED AUGUST 15, 1980 MARKED DEANGELO EXHIBIT-NUMBER 4 FOR-IDENT.)

(Discussion off the record.)

BY MS. PHARES:

Q. Mr. DeAngelo, I have a couple of questions about these documents. If you would refer first to what has been marked as Plaintiff's 3.

A. (Witness nodding.)

Q. Are you familiar or do you recognize this contract?

MR. KOHANE: Note my continuing objection to questions based on Plaintiff's 3 and 4 based on relevance.

MR. SLATTERY: Let me note also in the record in producing all of these documents we reserve the right to object on relevance grounds. We will attempt to limit the need to do so.

THE WITNESS: Yes, I've signed it and I've seen it.

MS. PHARES:

Q. So is it your signature on page 12 that appears above the line that says assistant vice president, real estate?

A. It is.

Q. Did you negotiate this agreement?

A. I was involved, but I didn't really negotiate it.

Q. Did you need approval from a superior before signing the agreement?

A. I'm not certain. I'd have to check.

Q. On what do you—I noticed that you were leafing through the document in order to decide whether or not. On what is the basis whether you needed approval?

A. The issue I was concerned and looking for was whether it was basically an extension of an existing agreement or brand new agreement. If it was an extension of an existing agreement, I could sign on my own authority; if it wasn't, I would probably take it to my board of directors.

Q. And the reason you're not sure is what?

A. Well, I would have to see what the previous agreements were and see if it was consistent.

Q. Well, I can help you if you turn to Plaintiff's 4. In particular, if you look at paragraph 4 of Plaintiff's 3 which says this agreement cancels and supersedes a prior agreement dated—

A. Paragraph 4 of Plaintiff's 3?

Q. Section 4 of Plaintiff's 3 which recites it cancels and supersedes an agreement dated August 15th, 1980.

A. Uh-huh. I'm not sure if I did on my own authority or took it to my board of directors. I'm not certain.

Q. How would you check if you were going to verify that?

A. If I was going to verify it, I would look back through the minutes of the boards of directors meetings and see if I took it there or not.

MS. PHARES: We have asked for the production of minutes of the board of directors relating to advertising. If they haven't been produced, should I assume there aren't any?

MR. SLATTERY: I don't have your document request in front of me so I don't know whether that is the case or not.

If you are making a statement now that you want those minutes produced, I will be happy to get back to you as to whether or not we are willing to produce them and if in fact documents that are responsive to your request exist.

MS. PHARES: I know you represent yourself being privy of my conversation with Mr. Landman, but I would like it to be clear we are interested in any minutes of the board of directors or any of its committees relating to any of Amtrak's contracts or policies relating to advertising, and specifically advertising at Penn Station.

(Pause in the proceedings.)

* * *

[107:11 - 109:12] Q. Mr. DeAngelo, on page 10 of Plaintiff's 3 there is a section 29 regarding nondiscrimination. Does Amtrak insert a paragraph like that in all of its advertising contracts?

MR. SLATTERY: Objection. No foundation and also ambiguous.

BY MS. PHARES:

Q. But you are permitted to answer.

THE WITNESS: Am I?

MR. SLATTERY: I'll put my hand over your mouth if you can't answer.

THE WITNESS: I keep looking for guidance.

MR. SLATTERY: I will tell you if you can't.

THE WITNESS: I think that is a standard clause in more than just advertisement contracts.

BY MS. PHARES:

Q. Do you know why it is inserted in at least advertising contracts, but maybe other contracts?

MR. KOHANE: Objection.

MR. SLATTERY: No foundation, speculation and also no relevance.

MR. KOHANE: It calls for a legal conclusion.

MR. SLATTERY: And I will join in that objection.

BY MS. PHARES:

Q. But you can answer the question.

A. I assume it's included as a matter of corporate policy.

Q. Turning to Plaintiff's 4, I realize this contract was signed before you were with Amtrak, but do you recognize the contract?

A. I do.

Q. Was this the contract that was in effect when you came to Amtrak?

MR. SLATTERY: Objection. It calls for a legal conclusion.

A. I believe it was.

Q. And was Kurt Weissheimer, your predecessor?

A. Yes.

Q. And it was Kurt Weissheimer who signed on behalf of Amtrak; is that correct?

A. That is correct.

MR. KOHANE: Objection.

* * *

[114:2 - 114:25] Q. In Plaintiff's 5, there is a notation of an enclosure.

A. Uh-huh.

Q. Is it your understanding of what was enclosed was the copy for the advertisement for which TDI was seeking Amtrak's approval?

A. I would assume that from the language of this letter.

Q. And do you understand that that's what was shown to you whenever it was that you saw it?

A. I believe so.

Q. And why did you reject the ad?

A. It was not a commercial contract as we discussed earlier. It was not promoting a service or a product.

Q. Was that the reason you rejected it?

A. Uh-huh.

Q. How did Mr. Bourque describe the ad to you?

A. Well, I'm trying to remember. I can't recall precisely. I just can't do it. He made reference to the fact that it was talking about the Coor's people, talking about several

* * *

[128:2 - 134:4] Q. Do you know whether or not the board members have been informed of this lawsuit?

A. I'm not aware that they have been.

Q. And when does the board meet in the month of January?

A. The fourth Wednesday which is—do you have your calendar there? Whatever the fourth Wednesday is.

Q. So that would be January 28th?

A. If that's the fourth Wednesday, that's when it would be, yes.

Q. And when was the November/December meeting?

A. December 1st.

Q. That makes sense.

A. Well, actually—sorry. December 2nd. December 1st were committee days, December 2nd is the board days.

MS. PHARES: All right. Now, I'm going to mark as Plaintiff's 7 the most recent copy of Amtrak's annual report with which we have been provided which is 1991.

(AMTRAK ANNUAL REPORT FOR 1991 MARKED PLAINTIFF'S EXHIBIT-NUMBER 7 FOR-IDENT

BY MS. PHARES:

Q. Before moving directly to discussion of this exhibit, how are the revenues from advertising used?

A. How are they used?

Q. Yes.

MR. SLATTERY: Objection. Lack of foundation.

BY MS. PHARES:

Q. Well, are there any revenues from Amtrak's advertising?

A. There are.

Q. Glad to hear it. How are those revenues treated when they are earned?

MR. SLATTERY: Same objection.

You can answer.

A. They are treated as revenue and goes into the general revenue fund.

Q. Okay. Now, is it accurate to say that Amtrak's operating and capital is subsidized by the federal government?

MR. SLATTERY: Objection. For foundation and for relevance.

MR. KOHANE: And to form.

MR. SLATTERY: You can answer the question.

I'll join in the form objection.

THE WITNESS: Yes.

BY MS. PHARES:

Q. Do you participate at all in the preparation of reports that are made to Congress?

A. Only to the extent that I prepare for a section of the report I give for my department.

Q. For real estate?

A. Right.

Q. And do you know what reports are prepared for Congress?

MR. SLATTERY: Objection. Ambiguous, but you can answer it.

A. Not really. I know there are reports that go out. I don't know exactly what they are, I don't pay that much attention to them.

Q. Are you personally familiar with how the subsidies for Congress are allocated?

A. In a general sense I am.

Q. Would you describe in that general sense how they are allocated?

A. Yes. There is two types of funds. Capital funds and operating funds. Operating funds, each year the corporation prepares an operating budget. That operating budget is done in consideration of anticipated revenues for that year. We are obligated by policy commitment to achieve each year a certain revenue cost ratio; that is, the percentage of the total operating costs of the corporation that we achieve through our own efforts as opposed from a subsidy from Congress.

Therefore, when we prepare the budget for the corporation, if we know that the revenue cost ratio is going to be 79 percent, that is the commitment. If we estimate what our revenues are going to be, X, then our revenues must equal 79 percent of total cost, so you have your revenue estimates and you have your percentage, then you determine the total amount of operating cost you can have and still achieve that revenue cost ratio. That then sets the budget for the entire corporation.

Then there is a process managed by the finance department by which they obtain a budget from each of the departments within the corporation.

Q. And to the extent that Amtrak is unable to achieve its total operating costs from its revenues, it seeks to make up the difference from Congress; is that correct?

A. That's correct.

Q. So, to the extent that Amtrak is able to increase its revenues, it is similarly capable to decrease the request of subsidy from Congress; is that correct?

MR. SLATTERY: Objection. Foundation and speculation.

A. The answer is yes.

Q. Early in your answer, you referred to the policy in which Amtrak attempts to achieve the particular percentage. By whom is that policy set?

A. I believe by our president.

Q. Is the policy set in order to reflect a directive from Congress?

MR. SLATTERY: Objection for foundation.

BY MS. PHARES:

Q. If you know.

A. I don't think so. I think—I don't think so.

Q. Okay. If you turn to page 26, if you would, of Plaintiff's 7. In particular, to the second full paragraph on the page.

A. Got it.

Q. There is a reference in that paragraph to the Railroad Retirement Tax Act.

A. Uh-huh.

Q. And the Railroad Unemployment Repayment Tax. Do you know what that refers to?

MR. SLATTERY: Objection for foundation.

You can answer the question.

A. In a very general sense, but I wouldn't want to be held out as an authority for the subject.

Q. All right.

A. Prior to this particular fiscal year, Amtrak itself was obligated to make this deposit with the IRS from reading the sentence, and Amtrak argued and Congress agreed that that payment should be made directly by the Railroad Administration and not from Amtrak because that had an impact on this revenue cross-ratio.

* * *

[135:11 - 138:19] Q. Mr. DeAngelo, the authorization for Amtrak is set out on page 26 for fiscal year 1992. Do you happen to know what the authorization is for fiscal year 1993?

MR. SLATTERY: Objection for foundation.

A. What do you mean by "authorization"? Dollars?

Q. Yes.

A. Appropriations Or authorization?

Q. Appropriation.

A. I don't know what it is for this fiscal year.

Q. Do you know whether its larger than $711 million?

A. No, I don't.

Q. Do you know whether or not Amtrak pays real estate taxes on its real estate?

A. Yes, I do know.

Q. Does it?

A. No, it does not.

Q. That means that Amtrak does not pay real estate taxes on Penn Station?

A. That's correct.

Q. It doesn't pay real estate taxes on any of the track that go through New York state?

A. That's right.

Q. Why not?

MR. KOHANE: Objection.

MR. SLATTERY: Objection for foundation and calls for legal conclusion.

THE WITNESS: Through an act of Congress.

BY MS. PHARES:

Q. Does—let me put it this way. If it earned a profit, would Amtrak pay income taxes?

MR. SLATTERY: Objection. Foundation, speculation, calls for a legal conclusion.

A. We would love to. The answer is I believe that to be the case and we would dearly love to be in that position.

Q. So far as you know, has Amtrak ever paid income taxes.

MR. SLATTERY: Same objections.

A. Amtrak has never paid income taxes.

Q. Does that include federal, local and state income taxes?

MR. SLATTERY: Same objections.

A. I don't know about ever in that connection. You're now referring to income taxes alone or all taxes?

Q. Income taxes alone.

A. To the extent that local authorities require one to make a profit before one pays income taxes, I'm sure that is the correct answer.

Q. What you're saying is Amtrak has never made a profit; is that correct?

MR. SLATTERY: Objection. Foundation.

THE WITNESS: That's correct.

MS. PHARES: Off the record.

(Discussion off the record.)

BY MS. PHARES:

Q. What is the relationship between the Federal Railroad Administration and Amtrak?

MR. SLATTERY: Objection for foundation and relevance grounds.

You can answer.

A. The Federal Railroad Administration is that federal agency through which our federal funds flow and through which we have a lot of dealings because, for example, they are responsible for railroad safety including Amtrak and other railroads as well, and they are responsible for promotion and safety and other parts of the railroad industry, so we have a lot of dealings with them on a regular continuing basis.

* * *

[140:19 - 154:15] MR. SLATTERY: Objection for foundation and speculation, but you can attempt to answer the question if you know the answer.

A. Well, I could not explain this particular number.

Q. You cannot?

A. No.

Q. Does your department—let me put it this way. Is revenue earned by your department through the operations of your department?

A. Is there revenue earned?

Q. Yes.

A. Yes.

Q. From what?

A. A variety of things.

Q. Such as?

A. Leasing of retail stores in stations, telephones in stations and elsewhere on our property, the leasing and/or sale or granting of easements for other property that we own, for licenses we give to utility companies to either run along side of or cross our right of way for the purposes of putting in utility lines for or things of that nature, for advertising and similar types of things.

Q. Does the revenue that is earned through the operations of your department include for example the lease at Penn Station to the Long Island Railroad?

A. That's going to take a long time to answer that. That's not a yes or no answer.

Q. Well, you don't have to answer it yes or no.

A. Okay. I'll give you the long answer.

The Long Island lease arrangement called for payment of $45 million, more or less, roughly. The corporation received that $45 million at that time which was five years or so ago.

The corporation put that money into an account, I believe a separate account, and then it was taken as revenue to the corporation as that money has been expended for the construction of a centralized traffic control system in New York in joint venture with the Long Island Railroad.

Q. Do you know is the Long Island Railroad a part of the New York Metropolitan Transit Authority?

A. It is.

Q. Is the payment that you are referring to the same payment that is indicated on page 31 of Plaintiff's 7?

MR. SLATTERY: Objection. For foundation and speculation.

A. Where is that on that page?

Q. On page 31 under note 9.

A. I see it. That's correct. It even says what I just said. Isn't that nice.

Q. Perhaps you know more than your counsel thinks you do.

And when you refer to easements as being a source of revenue in your department, does that revenue also include easements at Pennsylvania Station?

A. Probably. Probably.

Q. Probably yes?

A. Probably yes.

Q. Are those the kinds of easements that you described earlier relating to the subway or would these be the kind of easements that you just described relating to utility companies or both?

MR. SLATTERY: Objection. Ambiguous.

You can answer.

A. What I have in mind was we granted a series of easements to the Long Island Railroad in addition to this lease. And some of these easements were at no cost, some were at a cost and that's what I was thinking of in response to your question.

Q. Fine. Now, I have another question. I'm not asking you a personal question, and I don't need the specifics, is the salary of employees of Amtrak tied to the federal salary scales in any way?

MR. SLATTERY: Objection for speculation, foundation and relevance.

You can answer.

A. No.

Q. Do you know whether or not Amtrak pays Social Security?

A. Amtrak as a corporation?

Q. Yes.

A. I believe they do not.

Q. Do Amtrak employees have Social Security withheld from their wages?

A. No.

Q. Do they have some sort of retirement monies withheld from their wages?

A. Yes.

Q. And do you know into what fund that is paid?

A. Yes.

Q. What is that?

A. RRTA which I believe is Railroad Retirement something something.

Q. Okay. Is the Amtrak telephone system tied in with the federal telecommunications system?

A. No.

Q. Does Amtrak have its own telecommunication system?

A. Yes.

Q. And does an ATS in front of an Amtrak number refer to the Amtrak telecommunication system?

A. It does.

Q. Does Amtrak lease any property from the federal government?

MR. SLATTERY: Objection for relevance and for foundation.

You can answer it.

A. I don't think so. I can't think of any offhand. We lease a lot of property. Offhand I cannot think of any that we lease from the federal government—

Q. Does Amtrak—

A. —directly.

Q. You mean you—

A. Well, I say that because I told you earlier, this facility we are in right now is owned by the federal government, leased to the Union Station Redevelopment Corporation which in turn subleases to LaSalle partnership who in turn leases it to us, so in that link there is a role there, but it is not direct.

Q. I see. Is there any other similar indirect leasing of stations along the Northeast Corridor?

A. That is leased from the federal government?

Q. That's correct.

A. I can't think of any.

Q. Are there any leases of property from states along the Northeast Corridor?

MR. SLATTERY: Objection for relevance.

You can answer.

A. I'm trying to think. I can't think of any. I can't think of any from states. I can't think of any.

Q. Local governments?

MR. SLATTERY: Same objection.

You can answer.

A. Yes.

Q. Which local governments?

A. Now you're really going to make me think. I'm not really sure what the precise entity is whether it is a local government per se, that is a city or whether it is some sort of authority that has been created by one or more local governments or what, so I'm not sure what entities we're talking about, but we lease space in a station from a local entity of some sort.

For example in New Haven, Connecticut, we do. I think of that one. In Newark, New Jersey we do. I can think of that one. Trenton, New Jersey. That might even be—it's not the state, but it may be a creature of the state. I'm not sure in the case of New Jersey. They are the ones that I can think of from the top of my head.

MR. KOHANE: It seems the answer may have included legal conclusions, so I move to strike.

MR. SLATTERY: Let me note for the record, although we allowed some leeway here, I cannot conceive of any possible relevance about the state or local relationship with Amtrak, and have therefore objected to them and hope we will be able to move on to more relevant topics.

BY MS. PHARES:

Q. Do you know how much Amtrak made in advertising in 1991?

A. No.

Q. Do you have any estimate?

MR. SLATTERY: Objection for ambiguity. Are you talking about all advertising?

MS. PHARES: Station advertising.

THE WITNESS: Your question is do I have an estimate?

BY MS. PHARES:

Q. Yes.

A. I would say it's in the hundreds of thousands of dollars.

Q. Would you say over $500,000?

A. You're now limiting this to station advertising; is that correct?

Q. Well—

A. I'm not trying to be cute, I want to know what you're talking about.

Q. Well, maybe what I should ask you first is what other advertising do you have? There is station that I am aware of. Right of way advertising.

A. Uh-huh.

Q. And I'll exclude any advertising if any within a train.

A. Well, there is none. Then there is billboards. I don't know if that's what you meant by right of way or not.

Q. That's what I meant.

A. Billboard and station, those are the two distinctions.

Q. If you can estimate the two separately for 1991.

A. Well, okay. Strictly an estimate from the top of my head, I would say it is probably in the range of several hundred thousand, probably for both of them. Somewhere in that range.

Q. And several hundred thousand—

A. Could be 3 or 400,000, something like that.

Q. For each of them?

A. Yeah.

Q. I'm not asking for a specific figure. I want just a range.

A. Yeah.

Q. So in total, you're saying—we're talking about maybe from 6 to $800,000 total?

A. Something like that. It could be more or less. That's my best estimate.

Q. Does your department make imminent domain decisions?

MR. SLATTERY: Objection.

A. It all depends on what you mean by "make decisions."

Q. Well, do you have the ultimate authority for the making of imminent domain decisions for the Amtrak railroad?

MR. SLATTERY: Objection. Ambiguous.

A. We make the real estate decisions, yes.

Q. That's what I'm referring to.

A. We make the real estate decisions.

Q. Is the ultimate authority for real estate imminent domain yours?

A. Yes.

MR. KOHANE: You mean within Amtrak?

MS. PHARES: Yes.

MR. KOHANE: He's not on the bench.

BY MS. PHARES:

Q. Are those decisions reviewed by the board?

A. You're talking now where I exercise the right of imminent domain to purchase property?

Q. That's correct?

A. They could be depending on the amount of money involved.

Q. Is there a threshold above which you are required to report to the board?

A. There is. Now you're going to ask me what it is and I don't remember. It's a number and I just don't recall the precise number.

Q. Once again, could you give me an estimate? Is it $100,000?

A. It's probably like $500,000, something like that.

Q. Okay. And if there is a decision to sell property, real estate, is that a decision made by your department as well?

A. Yes.

Q. And similarly, whether or not you have to report that to the board, it's set by a certain threshold amount?

A. No. All sales receive board approval prior to the sale.

Q. I take it you can't sale Pennsylvania Station without the board's approval?

A. That's right. Without risking my neck.

MR. SLATTERY: You anticipated my relevance objection.

A. Although I've been tempted. Like right now.

Q. Do you know how much Penn Station is worth?

A. Excuse me?

Q. Do you know how much Penn Station is worth?

A. I thought you said how much temptation is worth. I have not the foggiest idea.

Q. Are there any mortgages on Penn Station?

A. Yes.

Q. And who are the mortgagees?

A. The federal government.

Q. In what amounts?

A. It's a mortgage for the entire Northeast Corridor including Penn Station, and I forget the number, but it's in the hundreds of millions of dollars.

Q. And do you know when those mortgages were put on the property on the Northeast Corridor?

A. Yes.

Q. When?

A. When it was acquired. As I testified earlier, either '76 or '77.

Q. Has Penn Station ever been appraised to your knowledge?

A. To my knowledge it has never been appraised.

Q. To your knowledge has there ever been a proceeding to evaluate the worth of the properties in the Northeast Corridor?

A. The total property in the Northeast Corridor?

Q. Yes.

A. No, not to my knowledge.

Q. Do you know from whom Penn Station was conveyed to Amtrak?

A. There was a chain which included Conrail. It went from the previous owner through Conrail to Amtrak.

* * *

[156:3 - 157:21] Q. Okay. Now, we had discussed earlier U.S. corporate income tax returns. Do you know whether or not Amtrak has ever filed any state or local tax returns?

MR. SLATTERY: Objection. Relevance and foundation. You can answer.

A. I believe we have.

Q. Okay.

A. But I don't know that for a fact. I'm not involved in that.

Q. Well, we have asked for production of income tax returns and I will just note for the record that we have not received any state or local tax returns. If there are any, we ask for production then—

A. Excuse me. Are you talking about income tax alone?

Q. Yes.

A. No, I do not believe we ever—well, I don't believe we ever paid income taxes. Returns, I don't know.

Q. That's different.

MR. SLATTERY: I will note the objection and also note that I cannot conceive of the possible relevance—I will note the request and note that I cannot conceive of the relevance, but I will see if I can get an answer to it, assuming we don't object to it and it may be something we can stipulate to.

MS. PHARES: I was going to say: Mr. DeAngelo has testified that there has been no state or local income tax paid and—

MR. KOHANE: Did he?

MR. SLATTERY: I don't think that is the testimony.

THE WITNESS: To the best of my—the reason I say that is because we never made any profits, therefore I assume we didn't pay any taxes, unless there is some jurisdiction that requires taxes paid on losses which I'm not aware of. That's strictly income tax. There are other types of taxes.

* * *

[158:8 - 165:12] Q. Who polices Amtrak's terminals?

A. Polices? In terms of security?

Q. That's right.

A. As opposed to cleaning up trash?

Q. Security.

A. We have a police department.

Q. And do the employees of your police department also serve under or are they designated as police officials of any state or local government?

MR. KOHANE: Objection.

MR. SLATTERY: No foundation.

MR. KOHANE: Legal conclusion.

MR. SLATTERY: I'll join in the legal conclusion.

THE WITNESS: No, they do not to the best of my knowledge.

BY MS. PHARES:

Q. Are any other railroads considered competitors of Amtrak?

A. No.

Q. Is that just because of the nature of where the lines run?

A. No.

Q. Are there other railroads?

A. There is no other inner-city passenger railroad.

Q. Except Amtrak?

A. Well, there is no other which implies—

Q. Why is that?

A. My guess is—

MR. SLATTERY: Objection for foundation.

MR. KOHANE: And I think it calls for a legal conclusion, but we'll see.

THE WITNESS: I don't know of anyone that wants to get in a business that's unprofitable.

BY MS. PHARES:

Q. Do the Amtrak security police have authority to make arrests?

MR. KOHANE: Objection. It calls for a legal conclusion.

MR. SLATTERY: I join in that objection, also I object on grounds of foundation.

THE WITNESS: The question was again?

BY MS. PHARES:

Q. Do they have authority to make arrests?

A. They do make arrests. I don't know the basis for that. I do not know what the authority is, but I know they make them.

Q. Do you know whether they carry guns?

A. Yes.

MR. SLATTERY: Objection. Same grounds.

BY MS. PHARES:

Q. And the answer?

A. Yes, they do carry guns.

Q. To whom do the Amtrak police report?

MR. KOHANE: You mean individual officers? Or—

THE WITNESS: You want the title and name?

MS. PHARES: Yes.

MR. SLATTERY: The title and name of somebody within Amtrak?

MS. PHARES: Yes.

THE WITNESS: The chief of police who is Mr. Sardino.

BY MS. PHARES:

Q. Under what particular division or portion of Amtrak is he?

A. He reports to the chief operating officer.

Q. And the chief operating officer is?

A. Mr. Sullivan.

Q. Do you know who owns Amtrak's stock?

A. Yes.

Q. Who?

A. The federal government.

Q. All of it?

A. Yes.

Q. Do you know when Penn Station was acquired by Amtrak what consideration was paid for it?

MR. SLATTERY: Objection. Foundation.

A. It was part of the purchase of the entire Northeast Corridor, so there is not a consideration for pieces of the corridor. The entire amount would be the amount of that mortgage we discussed earlier and I don't know what it is, but it's somewhere in the hundreds of millions of dollars.

Q. So, that was a mortgage that you said earlier was—for which the federal government is the mortgagee; is that correct?

A. Mortgagor.

Q. Is the mortgagor?

A. Whichever one. They hold the mortgage.

Q. They hold the mortgage?

A. Yeah.

Q. Okay. So is it correct then that the consideration paid at the time was paid by the federal government?

MR. SLATTERY: Objection. Foundation.

A. I believe so.

Q. All right.

A. I don't know if it was a cash transaction or in lieu of other things or what, I haven't the foggiest idea. It could have been the settlement of other obligations.

Q. Are you aware of any condition that is imposed by any state, local or federal authorities as a condition of doing business?

MR. KOHANE: Objection.

MR. SLATTERY: Ambiguous.

BY MS. PHARES:

Q. Are you aware of any conditions imposed by the federal government imposed on Amtrak as a condition of doing business?

MR. KOHANE: Objection.

MR. SLATTERY: Objection.

THE WITNESS: I really don't understand where you're coming with that.

BY MS. PHARES:

Q. I am going to ask it a little differently. Does the City of New York impose any conditions on Amtrak's operation of Penn Station?

MR. KOHANE: Objection.

MR. SLATTERY: Objection. Let me note for the record that I am objecting on grounds of relevance and ambiguity.

MR. KOHANE: And I believe it calls for a legal conclusion.

THE WITNESS: We observe a variety of local regulations. Without knowing the legal basis, I assume we are required to, but I don't know that, but we do observe them. There is probably hundreds of them that is imposed by a city on any operator or any business

BY MS. PHARES:

Q. Does Amtrak have to operate in any specific ways in order to satisfy the federal government?

MR. SLATTERY: Objection. Ambiguous and lack of foundation. That calls for a legal conclusion

BY MS. PHARES:

Q. Or does Amtrak have to operate or conduct its operations in its real estate holdings in such a way as to satisfy the federal government?

MR. SLATTERY: Same objection.

A. Well, you are now limiting this to real estate matters, nothing beyond real estate matters as it relates to any federal issue or requirement?

Q. Yes.

A. I'm not aware of any.

Q. Okay.

A. Other than as federal law would apply to any piece of real estate, i.e., an environmental law or something like that, but I don't know of anything specifically aimed at Amtrak.

* * *

[177:19 - 181:14] Q. Now, one question I have which perhaps you have answered, but since I'm not so familiar with the easements of Penn Station, so I will ask again.

Are there easements between either the MTA/Long Island Railroad or the subway to permit pedestrian access through Pennsylvania Station to respectively the Long Island Railroad or the subway?

A. Well, there are a number of leases which I signed, therefore I am familiar with them, since I've been here which go to such things as allowing the Long Island Railroad/MTA to construct certain things or have access through our area to construct certain things, I am familiar with those. I'm not personally familiar with easements that went to the issue of pedestrian traffic connecting the subway system with our station. I imagine they exist, but they would have been done many, many years ago prior to Amtrak's existence and certainly prior to mine involvement.

Q. And therefore would have been conveyed as operating leases along with the conveyance of Pennsylvania Station itself?

MR. SLATTERY: Objection for speculation, foundation and calling for a legal conclusion?

A. I would expect so.

Q. Without asking a legal opinion, that's your understanding?

MR. SLATTERY: Same objection.

A. I would be surprised if it were not so.

Q. And does Amtrak receive compensation from either the Long Island/MTA or a city authority, subway authority for any of these easements?

A. It has. I'm not sure it still does. I think usually those payments for easements are usually a lump sum, up-front payment.

MR. SLATTERY: When you refer to these easements, were you referring to the easements that Mr. DeAngelo testified that he was aware of the existence of and not the ones he wasn't sure about?

MS. PHARES: We will let the record speak for itself.

MR. SLATTERY: Okay. Let me say that's not the way I interpret it.

THE WITNESS: I answered that what I thought to be the question.

BY MS. PHARES:

Q. Well, whether we are referring to the leases that you signed personally or those which you testified you believed to

exist but preexisted your time at Amtrak, am I correct that any payment or your understanding is that the payment of such easements or leases are made usually when the lease is made?

MR. SLATTERY: Objection to speculation to the extent it requires the witness to testify about easements he is not aware of the existence of.

You can answer the question?

A. In our case, it is usually an up-front, lump sum payment in a case of this nature.

Q. And the leases that you have signed, do you recall whether they have been for no consideration or minimal consideration or not?

MR. KOHANE: Wait. I'm sorry. You're talking about easements or leases?

BY MS. PHARES:

Q. I beg your pardon. For the easements, that you described being familiar with because you had signed them, were these easements for which Amtrak receives any significant consideration?

A. There is both.

Q. And can you give me an estimate of the amount of the consideration?

MR. SLATTERY: We're talking about total consideration or consideration on a particular contract?

MS. PHARES: Total.

THE WITNESS: It would just be gross speculation on my part. I can't recall that. This is over a period of time and I sign hundreds of documents in the course of a year. I can't remember that.

* * *

[182:9 - 188:9] Q. Am I correct that you said the lease for the Long Island Railroad was entered into about five years ago?

A. Five or six years ago, something like that.

Q. And before that, did Amtrak operate or control the A level of Penn Station?

A. Yes, it did.

Q. And at that time did the Long Island Railroad operate through the station?

A. Yes.

Q. What was the relationship between Amtrak and the Long Island Railroad?

A. Difficult.

Q. Would you be a little more specific.

A. I'm not sure of the precise legal document, but there was some arrangement whereby they had the right to use that space under certain controls as we imposed. I'm not sure of the legal form of that document.

Q. Plaintiff's Exhibit 2 which is the current agreement between TDI and Amtrak—

A. Uh-huh.

Q. —Does it refer only to the B level of Penn Station?

MR. KOHANE: Objection. It speaks for itself.

MR. SLATTERY: Same objection.

THE WITNESS: It would speak to all the space in the station which we control and we still control certain portions of the A level space. I'm not sure if there is any signage in that portion or not.

BY MS. PHARES:

Q. Okay. If you look at Exhibit A to Plaintiff's 2, there is a listing of stations where advertising is installed, but I see no specification as to portions of the stations.

A. I don't see anything in that exhibit either other than the listing of Penn Station itself.

Q. Okay. You indicated that Amtrak retains control of portions of the A level. Are they public areas of the A level?

A. Yes, some are.

Q. Can you describe generally what kind of public areas remain in the Amtrak control?

A. Yes. There are a certain corridors which are for the movement of passengers from the trains out of the station or vice versa, and I think that's the public space in the A level that we control, it would be that.

Q. Is there any nonpublic space in the A level that you control?

A. We have certain Amtrak work space, different employees of Amtrak have offices there or work station of some sort or another.

Q. But none of that space has any interface then with the operation of the Long Island Railroad?

A. It may be adjacent to it or something like that, and I guess it's conceivable, I don't know, that some of their people and our people do things together in some sort of way which is perhaps unofficial, but helpful. I don't know.

Q. Now, it is also true that New Jersey trains come into Penn Station; is that correct?

A. That is correct.

Q. At what level do they come in?

A. Well, the trains come in on the track level like all the other trains. Their passengers will walk through the A level as much as any other passenger will, and they will also walk through the B level, as much as any other passenger will. Their ticket counters are located on the B level.

Q. That's the level that Amtrak controls?

A. Correct.

Q. What operates the New Jersey trains?

A. New Jersey Transit.

Q. Is that a public authority?

MR. KOHANE: Objection.

MR. SLATTERY: Objection.

THE WITNESS: I assume it is.

BY MS. PHARES:

Q. Are there ticket booths on the B level operated by lease from Amtrak?

A. I'm not sure if it is a lease or a license arrangement or what it is, but they have authority from us to operate the ticket counters.

MS. PHARES: I'm going to request production of those lease agreements.

THE WITNESS: I'm not sure it is a lease agreement.

MS. PHARES: Whatever kind of agreement or contract that provides for the ticket—

THE WITNESS: It maybe an operating agreement. I don't know what it is.

MR. SLATTERY: The request is noted.

MS. PHARES: Let me put it this way: A contract that provides for the use of space on the B level by New Jersey Transit Authority.

MR. SLATTERY: Your request is noted and we will respond to it reserving all rights to object.

BY MS. PHARES:

Q. Does Amtrak receive income from those—for the moment, Mr. DeAngelo, I'm going to call them leases but I'm not suggesting that's what they are.

A. Okay.

Q. Does Amtrak receive income from those leases?

A. Yes.

Q. Do you know what the annual income is on those leases?

A. No, I don't.

Q. Do you have any idea?

A. No.

Q. Do you know whether or not there are any joint arrangements among Amtrak and the other transportation operating authorities, and by that I'm referring to the Long Island Railroad/MTA or the subway system or the New Jersey Transit for things such as maintenance of Pennsylvania Station, baggage handling or any other services?

A. Joint arrangements is the question?

Q. Yes.

A. The lease with the Long Island Railroad which is a thick document which I don't recall the specifics of deals with how they control their space, how we control our space and where there is interface between. For example, security. Does the cop stop here or can they cross that line? And other types of issues like that, so there are such that lease that speaks to

it in the case of Long Island. I'm aware of that because I executed that lease.

I'm not aware of others, but there may be.

* * *

[202:14 - 203:23] Q. Mr. DeAngelo, I believe you testified earlier about the ownership of Amtrak stock; is that correct?

A. I did.

Q. Do you know whether Amtrak has preferred stock?

A. Yes. In this annual report I just read indicates that it does.

MS. PHARES: Objection. The document speaks for itself.

BY MR. SLATTERY:

Q. Let me remind you, you can just answer the questions that I ask you.

A. Oh, okay.

Q. And Mr. DeAngelo, do you know who the owner of that preferred stock is?

A. Yes, the federal government.

Q. Okay. And Mr. DeAngelo, prior to reviewing this portion of the annual report that I've just shown you, did you know whether or not Amtrak also had common stock?

A. No.

Q. Let me note for the record, and counsel can let me know if she objects, the last paragraph that I had you read contains a reference to common stock. Do you see where that is?

A. I do.

Q. Do you have any reason to doubt that Amtrak does, in fact, have common stock?

A. No.

Q. Do you know who owns that common stock?

A. No.

* * *

[215:22 - 216:7] MR. SLATTERY: Let me just state on the record for purposes of clarification that we were asked at some point in the course of this proceeding to produce all tax

assessments on Penn Station and that we have produced these documents because they are tax assessments on Penn Station and that they were the only ones in Amtrak's files.

MR. COLE: From 1992-93?

MR. SLATTERY: From any time.

* * *

[220:12 - 227:7] Q. I want to show you what has been previously marked as Plaintiff's Exhibit 36, an April 3, 1991 letter from Vincent Notaro to Bruce Bourque.

Have you seen this letter before?

A. I don't recall seeing it.

Q. The notations on the bottom that say agency fee equals 15 percent and then AMTK 65 percent of net, do you know whose handwriting that is?

A. No, I don't. It's not mine.

Q. And how about the circle and the okay on the third full paragraph of the letter?

A. That's not my writing. I don't know whose it is.

Q. And when it says at the bottom of the letter "Received April 8, 1991 Real Estate Development," is that your office or no?

A. That's a section of the real estate department. It's the section where Mr. Bourque works.

Q. Do you know what the purpose of this letter is?

MR. SLATTERY: Objection. It calls for speculation.

MR. SPIRO: I join in the objection.

THE WITNESS: Do I answer?

MR. SLATTERY: Yes, you do answer the question unless I tell you not to.

THE WITNESS: By reading it, it seems that Mr. Notaro is asking Mr. Bourque's approval of continuing the rent payment the same as it had been the prior year.

BY MR. COLE:

Q. And does Mr. Bourque have the authority to approve such terms, financial terms regarding the Spectacular?

A. No. He would come to me.

Q. So if the okay is an Amtrak notation, then that would have been approved by you or it wouldn't have been legitimate?

MR. SLATTERY: Objection.

BY MR. COLE:

Q. Is that correct?

A. I believe that to be correct, yes.

Q. But you don't remember approving this?

A. No, I do not.

Q. From your experience in dealing with the Spectacular, is this the common way in which terms for Spectacular contracts were approved by Amtrak?

MR. SLATTERY: Objection. Ambiguous.

MR. SPIRO: I join in the objection. It's also calling for speculation on the part of the witness.

MR. COLE: I'm asking the witness whether—

MR. SLATTERY: I'll join in that also.

MR. COLE: I'm asking the witness whether in your experience the transmission of letters from TDI to Amtrak stating what the terms of Spectacular contracts would be, was that the common practice for approving of the terms—for Amtrak's approval of the terms of such contracts.

MR. SLATTERY: Objection. Speculation. No foundation.

You can answer.

THE WITNESS: I'm not sure that the letter itself represents common practices or not. But there would be communications, letter or otherwise, between Mr. Bourque and someone from TDI. And to the extent that that would come to me and through channels and get my approval.

BY MR. COLE:

Q. And in what circumstances would such communications require approval from you? What did you have to approve?

A. Such things as the amount of money that would be paid for—like this letter requested, that sort of thing.

Q. And the length of time for which the contract was—

A. Yes.

Q. That would have to be approved by you as well?

A. Well, that would depend. If it was going to be extending something for a day or a week or something, they wouldn't have to come to me, but if it was significant, they would.

Q. And significant means more than a day or a week?

A. Well, it's not that well-defined, but each individual case would be looked at and they'd make a judgment as to whether or not it was significant enough to be brought to my attention.

Q. I'm going to show you what has previously been marked as Plaintiff's Exhibit 35. I think you're familiar with this. This is a one-page letter dated April 27, 1988 to Mr. Bourque and it's copied sideways so that it's not possible to see the bottom of the letter.

Are you familiar with this letter?

A. No.

Q. You don't—

A. Well, I mean, I may have seen it, but I don't remember. Whose signature is on this?

MR. SPIRO: I believe during Mr. Notaro's deposition he identified it as his signature.

THE WITNESS: Okay. I may well have seen it, but I don't recall specifically.

MR. SLATTERY: Let me also just note for the record that there's an indication in the text of the letter that there's a space below for a countersignature and that that is missing in this copy and that this is the only copy that Amtrak has.

MR. COLE: Is this the only copy that TDI has as well?

MR. SPIRO: TDI has looked through its files and has not found a copy of the letter.

BY MR. COLE:

Q. So you don't recall—would you have been the person in April 1988 if a letter—if this letter came to Mr. Bourque setting forth terms and asking for a countersignature, would you have been the person who would have countersigned?

MR. SLATTERY: Objection to the extent that it assumes that the letter was countersigned or the terms agreed to.

You can answer the question.

THE WITNESS: Yes.

BY MR. COLE:

Q. And the purpose of this letter would be the same as the purpose of the letter I just showed to you?

MR. SLATTERY: Objection. Speculation.

You can answer.

MR. SPIRO: I join in the objection.

THE WITNESS: No, not exactly. I see this as being more general than that last one as I recall.

Yes, this letter is more general than this letter.

BY MR. COLE:

Q. In what sense do you mean more general?

MR. SLATTERY: Same objections.

You can answer.

THE WITNESS: This letter spoke to a specific user, A&S. This letter based upon my quick reading does not refer specifically to A&S.

* * *

[227:9 - 227:14] Q. I'm going to refer you to Plaintiff's Exhibit 2 previously marked.

MR. SPIRO: Is that the 1991 agreement?

MR. COLE: This is the 1991 station advertising agreement between Amtrak and TDI.

* * *

[237:4 - 239:13] Q. Isn't it true that the rates for the Spectacular are set on a per-contract basis as approved by Amtrak?

MR. SLATTERY: Objection. No foundation and assumes facts not in evidence.

MR. SPIRO: I also am going to object on the grounds of vagueness.

BY MR. COLE:

Q. Do you know how the rates are set for the Spectacular?

A. I believe that it's 65 percent of the net revenue.

Q. And how is that set?

A. How is what set?

Q. How is that 65 percent reached, figure reached?

A. As opposed to some other number other than 65? That was a negotiation some time ago.

Q. And has that been the consistent figure that has been used since you've had authority over—

MR. SLATTERY: Objection. No foundation.

BY MR. COLE:

Q. How long have you had authority over contracts regarding the Spectacular?

MR. SLATTERY: Asked and answered at the first deposition.

You can answer the question.

THE WITNESS: Since March 1, 1982.

BY MR. COLE:

Q. And since March 1, 1982, has the agreement been that Amtrak would receive 65 percent of the net revenues that TDI received for Spectacular contracts?

MR. SLATTERY: Objection. No foundation.

You can answer it.

THE WITNESS: I'm not certain. It may have been. It may have been in that general range, but I'm not certain.

MR. SPIRO: I'm going to move to strike to the extent the witness is speculating.

MR. SLATTERY: I'll join in that objection and repeat the foundation objection.

BY MR. COLE:

Q. Now, how are the absolute terms, the absolute financial terms for the leasing of the Spectacular determined? Does Amtrak have to approve—I'm not talking about the percentage now; I'm talking about the amount, say $10,000 a month or $15,000 a month. Does Amtrak have to approve those rates?

MR. SLATTERY: Objection. Ambiguous.

You can answer the question.

THE WITNESS: Yes.

* * *

[240:2 - 247:22] MR. SLATTERY: I think it was asked and answered, but since it's been asked a little more clearly this time, I'll let him answer subject to an objection for foundation. I don't think we've established that this witness is the person who negotiates those terms.

You can answer the question.

THE WITNESS: Would you mind repeating the question. I've forgotten it.

BY MR. COLE:

Q. You stated that Amtrak has to approve of the amounts that are paid to place advertising in the Spectacular; correct?

A. Correct.

Q. And does Amtrak approve those amounts each time TDI makes a contract with an advertiser to display advertising in the Spectacular?

A. Yes.

Q. I'm going to show you what has previously been marked as Plaintiff's Exhibit 37.

Are you familiar with this document?

A. I'm familiar with many similar such documents. I'm not certain about this one.

Q. What is the purpose of this document, if you know?

A. I know the purpose of such similar documents. The reason I'm hesitating is I don't see my signature on this particular one, so I'm not certain as to that.

Q. Right.

A. But generally speaking, such documents are prepared to get approval at the appropriate level of the corporation for a particular transaction.

Q. So who would this form be prepared for generally?

MR. SLATTERY: Objection. Ambiguous.

You can answer the question.

THE WITNESS: It depends on the level within the delegation of authority process. If it was a certain level, it would be prepared for my—I'd be the final signator. If it was

another level, it would go to the executive vice president. Another level would go to the president. Another level goes to the board of directors.

BY MR. COLE:

Q. And the levels that you're referring to, are those monetary amounts?

A. Yes.

Q. And do you recall whether the subject matter of this document was approved by yourself or by the vice president or by the president or by the board?

A. No. I'd have to check. I do not recall.

MR. COLE: All right. I'll mark as Plaintiff's Exhibit 58 a set of minutes dated September 22, 1987 of a meeting of the board of directors real estate subcommittee.

(SET OF MINUTES DATED 9-22-87 MARKED PLAINTIFF'S EXHIBIT-NUMBER 58 FOR-IDENT.)

BY MR. COLE:

Q. Have you seen this document before?

A. Yes.

Q. Does this refresh your recollection of who approved of the A&S Spectacular sign agreement that is referred to in Plaintiff's Exhibit 37, the justification?

MR. SLATTERY: Just to clarify, when you ask whether he's seen it, I don't know whether you're including in it if it was shown to him by counsel in preparation for his deposition.

THE WITNESS: Yes.

BY MR. COLE:

Q. What is your recollection now?

A. Well, not my recollection, but what the process or procedures would call for, as opposed to a recollection, is that such a justification would have been prepared and signed by others than the one signature on this copy that you gave me and then included with material presented to this real estate subcommittee.

Q. And it's presented to the subcommittee for what purpose?

A. Approval.

MR. COLE: And then I'll mark as Plaintiff's Exhibit 59 a set of minutes from the same date from the finance committee.

(SET OF MINUTES MARKED PLAINTIFF'S EXHIBIT-NUMBER 59 FOR-IDENT.)

BY MR. COLE:

Q. Is the process that both the finance committee and the real estate subcommittee have to approve of leases of property by Amtrak?

MR. SLATTERY: Objection. Ambiguous.

BY MR. COLE:

Q. Let me clarify. This document indicates that the finance committee considered a resolution authorizing the lease of the advertising Spectacular sign location in Penn Station to A&S Department Stores, Inc. It's dated the same date as the prior document that I showed you, the real estate subcommittee minutes which contains the resolution itself entitled A&S Department Stores, Inc.

I'm just trying to understand, is it the practice that both the finance committee and the real estate subcommittee have to approve a lease such as this for the Spectacular before it can be entered into?

MR. SLATTERY: You're asking him if that's Amtrak's current practice or—

BY MR. COLE:

Q. Well, let's ask, was that the practice at this time in 1987?

A. The real estate subcommittee was a subcommittee of the finance committee. Therefore, as a matter of routine, the subcommittee would report to the full committee on everything, including this.

Q. So the real estate subcommittee has to approve it or recommend approval; is that correct?

A. Correct.

Q. Then the finance committee would approve or not approve; is that correct?

MR. SLATTERY: Let me just object that it mischaracterizes the witness' testimony.

MR. COLE: I'm just trying to understand. If it's a mischaracterization, the witness can tell me I'm mischaracterizing. I'm simply trying to get it clear.

MR. SLATTERY: Fine.

BY MR. COLE:

Q. First we have the real estate subcommittee makes a recommendation, then the finance committee considers that and makes its recommendation?

A. Correct.

MR. SLATTERY: Let me just state for purposes of clarity, when Mr. DeAngelo testified, he spoke in the past tense and you're talking in the present tense. He said it was the practice and you're saying it is the practice.

BY MR. COLE:

Q. Has the practice changed?

A. Yes.

Q. How has the practice changed?

A. There's no longer a real estate subcommittee.

Q. So is there still a finance committee?

A. Yes.

Q. So does the finance committee—is the practice now that the finance committee recommends and the board approves?

A. Correct.

Q. And at this point the procedure was that the real estate subcommittee approved, the finance committee approved and then the board approved?

A. That's right.

MR. COLE: I want to mark as Plaintiff's Exhibit 60—let's go off the record a second.

(Discussion off the record.)

(BOARD APPROVAL OF RESOLUTION MARKED PLAINTIFF'S EXHIBIT-NUMBER 60 FOR-IDENT.)

BY MR. COLE:

Q. Have you had a chance to review Plaintiff's Exhibit 60?

A. Yes.

Q. And does this reflect the board approving the resolution which was previously approved by the finance committee and the real estate subcommittee?

MR. SLATTERY: Objection. No foundation.

BY MR. COLE:

Q. You can answer.

MR. SLATTERY: I'm sorry. You can answer the question.

THE WITNESS: Yes.

* * *

[262:24 - 264:6] Q. Have you ever instructed anybody at TDI that they should not display public service advertising?

MR. SLATTERY: I just want to review the transcript.

(Pause in the proceedings.)

I'll permit the witness to answer this question for the purpose of laying a foundation for what I hope will be a new line of questioning.

THE WITNESS: Over the years, we have instructed TDI a number of times to maximize revenue to Amtrak, which means among other things making sure there's no space that is unsold. And we pushed that issue continuously.

I do not know of any time we've told them not to do public service advertising, but many times we've told them to do paid advertising.

BY MR. COLE:

Q. So is the basis for your objection to noncommercial advertising that it doesn't create revenue for Amtrak?

MR. SLATTERY: Objection. Mischaracterizes the witness' testimony.

MR. COLE: I'm not characterizing any testimony. I'm just asking a question.

BY MR. COLE:

Q. Is that the basis for your objection to noncommercial advertising?

A. It's certainly a basis.

* * *

[294:3 - 297:20] Q. And when you characterize it, a noncommercial advertiser, an advertiser who is not selling a product is paying full rates, how does that implicate Amtrak's concerns?

A. Well, that goes to the question of a concern. The "a concern" spoke to the issue we're always trying to maximize revenue. So that's a concern. But then there are other concerns that go beyond just making money that we have been discussing. The competitive thing, for example.

Q. Well, the competitive thing is about making money, isn't it?

MR. SLATTERY: Objection. Ambiguous and mischaracterizes the witness' testimony.

BY MR. COLE:

Q. Well, go ahead.

A. As I understood where we're going with this, there are two types of money issues here. One is the money you get for that particular advertisement being displayed. That's an X number of dollars. You get that.

The other type of money would be the potential impact that that advertisement may have in the case of the competitive thing on your overall revenue from selling tickets on trains, but not from that particular advertisement being placed there.

So that's the distinction where I think maybe I'm getting confused at least.

Now, the question?

Q. And the question is: What is the concern with an advertisement that does not promote a product or policy but is willing to pay full rate? Where does Amtrak's concern come from?

MR. SLATTERY: Objection. Asked and answered repeatedly at the last deposition and at this deposition as well. I'll let the witness answer this question in the hope that this is going to lead to a legitimate line of inquiry but subject to my objection.

You can answer it.

THE WITNESS: That goes to the same issue here. Put out part A which is the money being offered for the advertisement itself. That's not the issue. It goes to not promoting a product or service. It goes to that issue.

So if it's an advertisement that is noncommercial, i.e., does not promote a product or a service, then we would reject it, even though they offered to pay the rate, the going rate for it.

BY MR. COLE:

Q. And I guess I'm just trying to get as to is there a revenue concern in that context or is there a broader—you talked about the broader revenue concern.

Is there a broader revenue concern that leads you to object to noncommercial advertisements even when they're willing to pay?

A. That would depend I think on the particular advertisement.

Q. Was there a revenue concern with respect to the impact of Mr. Lebron's advertisement on Amtrak's revenues from passengers or competitors or anything like that?

A. Not directly.

Q. Indirectly?

MR. SLATTERY: If I can, are you asking him in the decision to reject the advertisement? I think the previous question is ambiguous.

MR. COLE: Yes.

THE WITNESS: Well, to the extent that there would be any concern on the part of anyone, meaning in this case the riding public, our potential passengers, that anything that they would negatively view Amtrak as a result of anything that happens in the station we try to avoid.

For example, dirty bathrooms, you try to avoid that because that would negatively impact a person's desire to ride trains.

The environment in the station you would try to avoid, so that would include such things as the type of advertising you would have in a station.

So would you try to avoid anything that would have that effect.

* * *

[314:7 - 316:13] Q. And does that mean that decisions that you make with respect to advertising policy must be in some way related to revenue concerns of the corporation?

MR. SLATTERY: Objection. Ambiguous. And also just so the record is clear, I'm restating—I restate my objection to this entire line of questioning, but I'm permitting the witness to answer it.

THE WITNESS: One of the major goals of the corporation is to maximize revenue. One of the major goals of my department is to maximize revenue. So we try to do things consistent with both of those goals.

BY MR. COLE:

Q. And do you consider the policy that you've explained about advertising standards for Amtrak, do you consider that policy to be designed to maximize the revenues of Amtrak?

MR. SLATTERY: Objection. Ambiguous.

You can answer the question.

THE WITNESS: Yes.

BY MR. COLE:

Q. Just to make it clear, do you consider the policy with respect to the contents standards that you apply to advertising to be related to the goal of maximizing revenues?

A. If the inference is that will we always maximize dollars, revenue dollars to the exclusion of any other consideration, the answer is no. We always try to maximize revenue, yes, but not to the exclusion of any other consideration.

Q. What other considerations do you take into account?

A. Well, the ones we discussed, you know, lots, competitive for example, commercial nature for example, pornography for example, those types of things.

Q. Now I'm not exactly clear. I thought you stated earlier that a revenue concern was that if you display an advertisement that is offensive to passengers, then they will associate that with Amtrak, they will not ride Amtrak, and that will have a revenue effect.

A. I did say something like that, yes.

Q. So in that sense, the content advertising policies are realted to revenue concerns?

MR. SLATTERY: Objection. Ambiguous.

You can answer.

THE WITNESS: In that indirect sense, yes.

* * *

[317:4 - 317:18] Q. Mr. DeAngelo, I've just handed you a document that has previously been shown to you at your deposition and that is marked as Plaintiff's Exhibit 36.

So that the record is clear on this, I'd just like to ask you, having looked at this document which I recall you were not able to identify—and correct me if I'm wrong about that—do you recall whether Mr. Bourque sought your approval for the terms described in this document, the financial terms and the renewal of the A&S contract?

A. No, I do not recall, but I imagine he did because our procedures would call for that.

EXCERPTS OF DEPOSITION TESTIMONY OF MICHAEL J. GALLAGHER

Deposition of Michael J. Gallagher, held at the offices of Siff Rosen, 233 Broadway, New York, New York 10279, commencing at 10:00 A.M., Wednesday, January 13, 1993, before Tammey M. Pastor, RPR.

* * *

[6:2 - 7:5] Q. Mr. Gallagher, would you please state your name and address for the record.

A. Michael J. Gallagher. I reside at 101 30th Street in Copauge, Long Island, New York.

Q. Could you briefly describe your educational background for me?

A. I attended St. John's Baptist High School and graduated in '74. After that I attended one year at Suffolk Community College. I majored in criminal justice. After one year I began employment with Amtrak in September of '75.

Q. Can you briefly describe your employment history with Amtrak from 1975 to date?

A. I was hired as a baggage man in September of '75 working out of Penn Station. I worked in the mail, baggage room, express department. Two years later I was promoted to supervisor of mail, baggage and express.

From there I was promoted to the general supervisor of mail, baggage and express.

In April of '90 I was promoted to the manager of stations, New York.

Q. Your current title is manager of station, New York?

A. Manager stations, passenger services, New York.

* * *

[8:2 - 10:3] Q. Can you describe your duties as manager of station services?

A. Basically I am responsible for the ticketing operation in Penn Station, the mail, baggage and express operation and the

station services operation. Those, the employees that are responsible for each department's operation report directly to me.

I am also responsible for passenger movement and any dealings with other railroads regarding passenger movement, passenger handling, train movement through Penn Station.

Q. Can you describe in a little more detail what your responsibilities are with respect to the ticketing aspect of your job?

A. The general supervisor of ticketing reports directly in to me. All right? The ticket operation in New York, in other words I am overall responsible for its operation and proper function.

Q. What is that operation, sir?

A. Basically to collect—the collecting of revenues, appropriate revenues, the issuance of tickets, the security of revenues collected. Everything involving the transaction regarding a ticket sale.

Q. Can you tell me what the mail bag and express operations encompass?

A. Again, the general supervisor of that department reports in to me. Basically responsible for all mail handling, U.S. mail handling through a contract with the U.S. Post Office and Amtrak, all checked baggage, temporary baggage that is handled by Amtrak, and all express or it's commonly known as freight that is handled and transported on our cars.

Q. Can you describe for me what is meant by the station services operations that you described?

A. Basically station services is the direct interaction and assistance of all passengers, whether it is the proper boarding of trains, proper assignment on trains, the assisting and ADA requirement.

Q. Excuse me, can you tell me what ADA requirements are?

A. American Disabilities Act. Basically overall passenger assistance.

Q. How does the Americans with Disabilities Act affect Amtrak?

* * *

[11:2 - 12:9] THE WITNESS: Well, I have to ensure or make sure that passengers can gain access to the station appropriate for those that might be confined to a wheelchair.

BY MS. SILVERMAN:

Q. You also mentioned you were responsible for passenger movement?

A. Yes.

Q. Is that different from the station services aspect of your job which you just testified about?

A. No. Basically it is the same.

Q. I believe finally you mentioned you were responsible for dealings with other railroads. Can you explain to me what you do in that capacity?

A. Within Penn Station is two other railroads that are tenants in the station. My dealing with them would be just for the daily business contact, whether it be equipment problems, group moves, or whether it came down to conditions of platforms which we share. It might regard trash removal, cleaning specifications.

BY MS. SILVERMAN:

Q. Who are these two other railroads that you say are tenants in Penn Station?

A. New Jersey Transit and Long Island Railroad.

Q. I believe you said they were tenants in Penn Station. Do you know whose tenants they are?

A. Amtrak's.

* * *

[13:4 - 13:8] Q. Do you have any interface with anyone from the MTA concerning Penn Station?

A. From time to time.

Q. What kind of communications or dealings do you have with people from the MTA?

* * *

[13:14 - 14:22] MR. LANDMAN: Do you actually have dealings with MTA separate from Long Island Railroad?

THE WITNESS: Metropolitan Transit. Yes, subway, is that what you are referring to?

MR. LANDMAN: I don't know if the witness is being asked about the Transit Authority or MTA which is the body that oversees the Long Island Railroad, Metro-North, as well as the TA. Why don't you answer who you have dealings with.

THE WITNESS: From time to time, all.

BY MS. SILVERMAN:

Q. Why don't we take them one at a time. If you could just tell me what type of dealings you have?

MR. LANDMAN: When you said "all" I had mentioned Metro-North. Had you ever had any dealings with Metro-North?

THE WITNESS: Yes.

BY MS. SILVERMAN:

Q. Why don't we take them one at a time. If you could describe for me what kind of dealings you have with people from Metro-North?

A. Presently my only involvement with Metro-North would be regarding the ticket operation, which I should have mentioned before I am responsible for. The Amtrak ticket operation is in Grand Central.

Q. What kind of ticketing operation for Amtrak is at Grand Central?

* * *

[15:5 - 26:5] THE WITNESS: I guess it was approximately 2 years ago, to start off. Amtrak had its Empire Service operating out of Grand Central. I was responsible for the passenger service portion of that operation for Amtrak at Grand Central which involved any passengers purchasing tickets and utilizing the trains out of Grand.

Some time ago this operation had been moved over, the train operation has been relocated over to Penn Station. With that transition we kept a satellite office in Grand Central, which basically just consists of two ticket sellers working a five-day week selling Amtrak tickets.

I am responsible for that operation over there, and the employees of that operation were brought into my office.

The dealings I would have with Metro-North was prior to us being there as a tenant in Grand Central and still as a tenant in Grand Central.

BY MS. SILVERMAN:

Q. Forgive me if you answered this, but when did the Empire Service begin out of Grand Central, if you know?

MR. LANDMAN: No, when did it begin out of Penn Station.

MS. SILVERMAN: No, out of Grand Central.

THE WITNESS: When did Grand Central come to Penn?

BY MS. SILVERMAN:

Q. No. When did Amtrak start offering an Empire Service that was at Grand Central and going wherever, if you know?

A. Since I have been working with the company it was over there.

Q. You have been employed since 1975?

A. Yes.

Q. Can you just briefly tell me what the Empire Service is?

A. Upstate points.

Q. Can you tell me what your contacts have been with employees from MTA concerning subway service?

A. Basic contact or conversations I have had with them are, number one, regarding the 7th Avenue access to the station. Basically crowd control conditions.

We had redeveloping that went on throughout the station, just had dealings with them on passenger egress to the station. Basically that was it.

The only other contact I do have with them is regarding their information services which are in Penn Station and located in Amtrak's information booth.

Q. Do MTA employees staff Amtrak information booths with respect to MTA information?

A. We are assigned to New York City Transit is staffed by an MTA employee, yes.

Q. Have they leased this window or this space from Amktrak?

A. No.

Q. Do they provide you with any monetary consideration for their use of the window?

A. No.

Q. Did you negotiate with the New York City Transit Authority to permit them to have an employee at one of the Amtrak windows?

A. Yes.

Q. When did that occur?

A. That has been at least two years ago

BY MS. SILVERMAN:

Q. You mentioned that you have dealt with New York City Transit concerning crowd control conditions?

A. Yes.

Q. Can you describe what that is about?

A. I will try to give you one example that hopefully will describe it. When we had the Democratic National Convention, a lot of exits were restricted during certain hours.

There was a lot of informational signage that was placed around, you know, the perimeter of Penn Station advising subway riders, if you will, to utilize certain entrances which

might have been Amtrak's, designated as an Amtrak entrance during these times.

Q. Can you describe your dealings with New York City Transit concerning the 7th Avenue access to the station?

A. The area I was referring to is the access that comes into the Hilton corridor which is basically the dividing line between Amtrak and Long Island Railroad property, if you will.

The corridor is Amtrak's responsibility as far as maintenance, whether it is cleaning or repair, structural repairs. When I referred to that earlier, I was regarding repairs that were needed down by that area where their token booth is.

Q. Can you describe for me the dealings you have had with LIRR employees concerning Penn Station?

A. Well, there has been several dealings regarding several issues ranging from station redevelopment versus basically boundary lines as they relate to janitorial services.

Q. What kind of dealings have the ones concerning station redevelopment been?

A. Basically when Amtrak, we were going through certain redevelopment, probably more so now on Long Island going through their capital program. I just had dealings with my counterparts and I was responsible for their end of the Long Island terminal regarding closing down of certain stairways, closing of escalators, crowd control conditions.

Q. Are there any areas of Penn Station that Amtrak and LIRR are jointly responsible for the maintenance, upkeep or cleaning of?

MR. LANDMAN: Just note my objection. I think that is spelled out in the lease agreement.

A. We are responsible for our own, as outlined.

Q. There is no overlap between LIRR and Amtrak?

MR. LANDMAN: Same objection.

THE WITNESS: I really don't understand what you are asking. Are you asking if it is—we both clean one particular area?

BY MS. SILVERMAN:

Q. Yes.

A. And just alternate on it?

Q. Either just alternate on it or one compensates the other for cleaning—

A. No.

Q. —services?

A. No.

Q. Do you have that type of relationship with New York City Transit concerning any of the subway stairways or corridors that lead to the subway areas?

A. No.

Q. Is New York City Transit responsible for the upkeep of the areas leading to and from the Amtrak areas of Penn Station?

MR. KOHANE: Objection to the form of the question.

MR. LANDMAN: Same objection.

Do you understand the question?

BY MS. SILVERMAN:

Q. If you know.

A. I am not quite sure we are talking about areas that they would come from, for example, Amtrak areas into theirs?

Q. Yes.

A. We are responsible for our own cleaning of our own areas, which might lead into their responsibility of area.

Q. At some point New York City Transit becomes responsible for the upkeep and maintenance of certain areas of Penn Station?

MR. LANDMAN: Objection. I don't think that is what he said.

THE WITNESS: No. What I am saying is, I will use an example of the Hilton corridor again, which is under my janitorial contract for cleaning, okay, to a certain location where it becomes Transit's property.

BY MS. SILVERMAN:

Q. With respect to New York City Transit, do you know how the determination was made between what was going to be considered their responsibility as opposed to Amtrak's responsibility?

MR. LANDMAN: Objection, no foundation, I don't think. I don't think he testified he was involved in that at all. You can ask him if he knows.

THE WITNESS: No.

BY MS. SILVERMAN:

Q. Had it been that way from the time you began your employment with Amtrak, that you were aware?

MR. LANDMAN: Objection. I think he started in the baggage department. I am not sure he would have been aware.

THE WITNESS: All I can say is that when I took over this position, okay, on the date as I mentioned before, they were in existence.

BY MS. SILVERMAN:

Q. I believe you said you took over the position in 1990?

A. April, yes.

Q. Who was your predecessor?

A. My predecessor was Joseph Dealy.

Q. Have you had any communications with anyone from New Jersey Transit concerning the running of Penn Station, maintenance of Penn Station or any other aspect of Penn Station?

A. Yes.

Q. Can you explain what kind of communications you have had?

A. Basically, as I said before, New Jersey Transit is a tenant in Penn Station.

We jointly share platforms with them. They have certain platforms that basically are assigned to them within the station for their equipment. Conversations I might have with

them would be regarding proper removal of trash from the platforms, passenger elevator discussions for handicapped, setting up procedures to assist them with the handling of any handicapped passengers that might be traveling on their trains.

Just general discussions of any event, programs that might be going on.

Q. Earlier I believe you mentioned that with respect to New York City Transit during the Democratic Convention there were certain access stairways to transit level that were closed.

Had you had any conversations with any of the other tenants in Penn Station concerning the Democratic National Convention and what that would mean for service?

A. Yes.

Q. Can you briefly describe the types of communications you had concerning the Democratic National Convention with these other entities?

MR. LANDMAN: Just note my objection as to relevance.

THE WITNESS: Prior to the official start off, if you will, of the convention in Madison Square Garden, it was approximately a year before that, I was designated as the Amtrak contact, okay, with the City of New York and with the DNC.

During the course of meetings that were held by all types of agencies, I was asked for contact that could be made to certain representatives of other railroads within Penn Station, more so just as a point so everybody was on the same level and everybody was keyed into exactly what was going on and all.

On my own, being that I was the delegate of the station and I would have several meetings not only with Amtrak departments, but I also would invite the other agencies, too, so they know exactly what was going on as far as closing down, restriction of areas, certain events going on, times of day they were going on, and what our involvement was going to be with special train operations, et cetera.

Q. You mentioned other agencies. Can you tell me who they are?

A. Transit. New Jersey Transit. I spoke with Long Island Railroad. Then all departments which there is many within Amtrak.

* * *

[31:4 - 31:6] Q. Let me show you documents which have already been marked as Plaintiff's Exhibit 13 and Plaintiff's Exhibit 14.

* * *

[31:20 - 34:3] Q. Yes. It is my understanding this drawing, what this is, just for the record is, I guess it is a floor plan for Pennsylvania Station, different levels. It is my understanding it is a little old and may not be completely accurate as identified on the document.

Just also for your information, the blue penmarks that you find on Plaintiff's Exhibits 13 and perhaps 14 were made yesterday by Mr. Schwartz during his deposition.

A. Okay.

Q. Could you show me where the Amtrak ticket windows currently are located?

A. Back in here. Where the P's are.

Q. I will just note that this drawing being old had the ticket offices in a different location on the drawing. So I would ask you take this red pen and mark Plaintiff's Exhibit No. 13 to reflect where the "Amtrak ticket offices" currently are?

A. How?

Q. Just if you want to draw either a square, a rectangle or some kind of marking and then we can write "Amtrak ticket offices" near it so that we will know where they are located.

A. Basically, again, right in this area again, here.

Q. Can you just write "Amtrak ticket office" so we will know that is what the red triangular figure represents.

Thank you.

Mr. Gallagher, is it in one of these ticketing windows or ticket offices that the New York City Transit Authority has someone stationed?

A. No.

Q. Can you point to where the person from New York City Transit is located?

You don't have to draw it at this point.

A. This vicinity right in here. Right in here. General area right here.

Q. Are there any other ticket offices underneath there?

A. No.

Q. So there is just a New York City Transit person in that space?

A. No. Right in this location, as I indicated, is the Amtrak information booth and the Amtrak train announcer. In this booth also is a window provided for the Transit Authority employee.

Q. When someone is going to this booth, do they come this way to the booth?

A. They can.

* * *

[44:6 - 49:24] Q. When did you first become aware that a free speech policy existed for Penn Station?

A. Prior to me being appointed to this job I knew of a policy, whether there was a policy. I didn't really become actually involved and/or familiarized with it thoroughly until I took over the job, which was April of '90 or thereabouts.

Q. Did your predecessor at that time you were taking over the job inform you of the fact you would have responsibilities with respect to a free speech policy?

A. I am not quite sure.

Q. Do you recall around the time that you took this job whether you had discussions concerning your responsibilities with respect to a free speech policy with anyone?

A. Yes.

Q. Who was it?

A. I believe back then it was the person whom I reported into at that time whose name is Jim Ricker. I reported into him at that particular time. I believe that is where I got involved with, you know, this is the policy, it will be your responsibility to control.

There might have been others at that time that offhand I don't recall.

Q. Do you recall anything else in substance or effect about that conversation with Mr. Ricker?

A. One thing that comes to mind is my conversation—what happened back then was even though the passenger services department would receive the application, the actual administering, if you will, of the permit was done by the police department, Amtrak police in the station.

To be quite honest, I found that sometimes these permits were given out unauthorized. That is where I became probably more involved at that point with this due to just walking around the station and finding people with permits that I had no idea about. And through conversations I had with the police regarding the policy and all, at that time people in charge were more than willing to say if you would like to take it over, that is fine with us. That is basically what we do.

We are getting back to what I had mentioned earlier when I brought it to the station operation, that is where the permits are kept, secured. For those that are authorized whether daily or whether yearly, receive their permits from me with the police department knowing that it is authorized.

Q. How does the police department get informed that permits have been authorized?

MR. LANDMAN: Objection. I don't think they do. I don't think he testified that they do. Is the police department informed?

THE WITNES: Well, it is twofold. Either they have been verbally, you know, advised or the persons that were authorized have the permit in their possession.

BY MS. SILVERMAN:

Q. How did people get unauthorized permits when the police department was responsible for issuing them?

MR. LANDMAN: Objection as to foundation. If you can answer, go ahead.

THE WITNESS: The only thing I can say is they just were unaware of proper procedure. That is all I can say.

BY MS. SILVERMAN:

Q. Who was unaware of proper procedure?

A. Whoever it was that handed them out.

Q. How did you find this out?

A. By walking around the facility and seeing someone that had one that I had no idea about. That, as far as I was concerned, they were unauthorized.

Q. What do you mean by "unauthorized"?

A. Because they weren't approved from our department.

Q. Just so I understand this, are you saying that back then what was happening was that the police were providing permits to individuals without informing the station manager's office that they were doing so?

A. That did happen, yes.

MR. LANDMAN: Back then you are referring to prior to April of 1990?

MS. SILVERMAN: Or around that time.

THE WITNESS: When I first became involved I—that is, like I said earlier, maybe that made me more involved if you will, at that particular time.

BY MS. SILVERMAN:

Q. Was that right at the same time you took over your current position in April of 1990 or was it some time after that?

A. It was after that.

Q. Do you recall approximately when it was that you met with the police and ironed out the way the policy would work in the future?

A. Offhand I am really not sure.

Q. Was it some time during that first year?

A. Oh, yes, I would say yes. Yes.

Q. I believe you testified that you have had one or a few meetings with representatives of the Amtrak police force to try and iron out how the procedure would work in the future; is that correct?

MR. KOHANE: Objection to the question as to what he testified to.

THE WITNESS: I had discussions with the appropriate personnel of the police department regarding the permits. How many and how in depth, I don't recall.

BY MS. SILVERMAN:

Q. Do you recall whether there were any written communications between you and the appropriate people within the police department concerning this issue?

A. Not that I can recall, no.

Q. Do you recall the name of the individual from the police department who you worked out the current arrangement with?

A. Back then, yes, I do.

Q. What is that person's name?

A. I think, I believe her title now is Inspector Cathy Johns.

Q. Do you know how long the police had responsibility for issuing permits prior to your revising the policy?

A. No, I don't.

* * *

[50:25 - 51:6] MR. LANDMAN: Just for the record to make sure you and the witness are on the same topic, the police we have been talking about all along have been the Amtrak police, not the city police. You understand that.

THE WITNESS: That's correct.

* * *

[89:22 - 93:2] Q. Let me direct your attention to paragraph 4 of Plaintiff's Exhibit 30. Can you identify for me what the public areas of Penn Station are?

MR. LANDMAN: As referenced in this document?

MS. SILVERMAN: What his understanding of what this refers to.

THE WITNESS: As outlined in number four?

BY MS. SILVERMAN:

Q. Yes.

A. Public areas within the facility, within the station, would be seating areas, concourses, waiting areas.

Q. Does the issuance of a permit pursuant to these guidelines entitle a person or a group to exercise free speech rights in areas of the station that have been leased to the LIRR?

A. I have no dealings whatsoever regarding the areas that come under the responsibility of the LIRR.

Q. So the answer to my question is no?

A. That's correct. No.

Q. Do you know—

A. Well—repeat the question for me again.

MS. SILVERMAN: We will have the reporter read it back.

(The pending question was read.)

THE WITNESS: No. No.

BY MS. SILVERMAN:

Q. Are you aware of whether the Long Island Railroad has any free speech policy concerning the space that it has leased from Amtrak in Penn Station?

MR. KOHANE: Objection to relevance.

MR. LANDMAN: Objection, no foundation and relevance.

THE WITNESS: I am not sure.

BY MS. SILVERMAN:

Q. Has the LIRR ever complained to you about individuals or organizations exercising free speech rights in Penn Station?

MR. LANDMAN: Objection.

MR. KOHANE: Objection to relevance.

MR. LANDMAN: Objection.

THE WITNESS: Not that I can recall.

BY MS. SILVERMAN:

Q. Are there any areas in Penn Station that are shared access spaces between the LIRR and Amtrak?

MR. LANDMAN: Objection to the form of the question.

THE WITNESS: We jointly share platform usage in the station, track usage, and passengers detraining from Long Island Railroad do come through Amtrak's portion of the facility for access to the street.

BY MS. SILVERMAN:

Q. Does a permit granted pursuant to Amtrak's free speech policy entitle a person or individual to exercise free speech rights in areas of Penn Station that have been leased to New Jersey Transit?

MR. KOHANE: Objection.

MR. LANDMAN: Objection.

THE WITNESS: With regard to the station facility itself, the only areas that have been leased and are the responsibility of New Jersey Transit is the ticket windows.

Q. So again is the answer to my question no?

A. No. Right.

* * *

[126:8 - 127:6] Q. Have you been involved in any negotiations with New Jersey Transit concerning New Jersey Transit's use of Penn Station apart from what you have already testified to today?

MR. KOHANE: Same objection.

THE WITNESS: I have been involved with both Long Island and New Jersey Transit regarding service enhancement to the station, if you will.

Not necessarily sit down negotiations, but discussions on current leasing and agreement with Long Island and what future capital program work that New Jersey Transit is looking at for Penn Station and for their area of operation.

BY MS. SILVERMAN:

Q. How often have you had discussions with people from New Jersey Transit?

MR. KOHANE: Objection.

Q. Is this an ongoing situation?

A. Not regularly. I just had, you know, several meetings with them or meetings I have attended with them.

* * *

[128:7 - 128:10] Q. Do you know whether the Amtrak police have responsibility for those portions of Penn Station that have been leased to New Jersey Transit and the LIRR?

* * *

[128:24 - 129:20] THE WITNESS: Long Island Railroad, no. New Jersey Transit, Amtrak police will respond to their request for assistance within the station, yes.

BY MS. SILVERMAN:

Q. Is it your understanding the Amtrak police will not respond to requests for assistance by the LIRR?

MR. LANDMAN: Objection, speculation. Assumes the Long Island Railroad police would request Amtrak police assistance.

THE WITNESS: That is exactly it. Long Island has their own police force within the station.

BY MS. SILVERMAN:

Q. Does New Jersey Transit have their own police force within the station?

A. New Jersey Transit has their own police force but they do not have any of their officers assigned on a permanent basis to Penn Station.

EXCERPTS OF DEPOSITION TESTIMONY OF BRUCE M. BOURQUE

Deposition of Bruce M. Bourque, held at the offices of Siff Rosen, P.C., 233 Broadway, New York, New York 10279, commencing at 1:48 P.M., Thursday, January 14, 1993, before Tammey M. Pastor, Rpr.

* * *

[5:6 - 6:24] Would you please state your name and address for the record.

A. My name is Bruce Bourque. 60 Massachusetts Avenue, Northeast, Washington, D.C. 20002.

BY MS. PHARES:

Q. That is your business address?
A. Yes.
Q. What is your home address?
A. 10006 Fleming Avenue, Bethesda, Maryland 20814.
Q. How old are you?
MR. SLATTERY: Objection on relevance grounds.
You can answer the question.
THE WITNESS: I was born in 1951. 41.

BY MS. PHARES:

Q. Would you describe your education after high school, please.

A. University of Connecticut BA. MBA Western New England College.

Q. What is your BA in?
A. Sociology.
Q. What position do you hold now?
A. Project director real estate development, Penn Station, New York.
Q. For how long have you held that position?
A. Four years.
Q. What position did you hold before that?

A. Project manager, Penn Station real estate.

Q. I beg your pardon, did you say four years in that position as well?

A. Yes. Well, I started in 1984.

Q. When you say "started," you mean you began in Amtrak in 1984?

A. Yes.

Q. When you began at Amtrak, was that as project manager real estate Penn Station?

A. Yes.

* * *

[7:16 - 7:20] Q. In your present position as project director, to whom do you report?

A. Don Pross.
Q. He in turn reports to Mr. DeAngelo?
A. Yes.

* * *

[12:13 - 13:14] Q. What responsibilities do you have at Penn Station?

A. I negotiate leases with prospective tenants, licensees. I work with the other railroads and Amtrak's neighbors on real estate matters. Work with property management type functions.

Q. What do you mean by "property management"?

A. Coordination with respect to cleaning and security and maintenance. Construction type coordination. From a real estate perspective.

Q. You mentioned that you negotiate leases with prospective tenants and licensees.

Do you sign those leases and licenses?

A. Signature?
Q. Yes.
A. No.
Q. Who does?
A. Tony DeAngelo.

Q. You make recommendations about the contracts and then Mr. DeAngelo decides whether they will be signed?

A. Yes.

* * *

[34:16 - 40:16] Q. Plaintiff's Exhibit 34, do you recall receiving this letter?

A. I don't absolutely recall it. I wouldn't say that I didn't receive it.

Q. There is a reference at the beginning of the letter to a conversation.

Do you recall discussing payment terms with Mr. Notaro?

MR. SLATTERY: At that time of this letter?

MS. PHARES: At that time of this letter.

MR. SLATTERY: Okay.

THE WITNESS: I don't recall a particular conversation.

BY MS. PHARES:

Q. Is it part of your responsibility to negotiate the payment terms for payments from TDI to Amtrak for The Spectacular?

A. No.

Q. Whose responsibility is it?

A. To the best of my knowledge, the rate has not been negotiated.

MR. KOHANE: Can we go off the record.

MS. PHARES: Yes.

Off the record.

(Discussion off the record.)

BY MS. PHARES:

Q. What do you mean the rate has not been negotiated?

A. To the best of my knowledge, the rate has been 65 percent—

MR. SLATTERY: Can we mutually agree to strike that answer?

MR. KOHANE: I guess we will redact it.

THE WITNESS: Is the question did I negotiate this rate or against a different rate or any rate? The answer is no.

BY MS. PHARES:

Q. As far as you know, is the rate set some place else?

A. Yes.

Q. Where?

A. The rate was set in letters like this. The rate was set in the 1980 contract.

Q. In the 1980 contract?

A. Yes.

Q. Has the rate, without specifying what the rate is, has the rate changed since 1980?

A. Not to my knowledge.

Q. Have you ever seen Plaintiff's Exhibit 35, the April 27 letter from someone unknown to you, someone's whose signature is not apparent?

A. Well, you know, I don't recall this particular letter. I just don't remember.

Q. The letter asks for a countersignature in a space below.

Is it the practice in your office for you to provide such a countersignature when it is requested?

A. Me?

Q. Yes.

MR. SLATTERY: Objection, ambiguous.

THE WITNESS: No.

BY MS. PHARES:

Q. Who does?

A. Generally, I would say it would be Tony DeAngelo.

Q. Anyone else?

A. Not to my knowledge.

Q. If you would refer to Plaintiff's Exhibit 36, Mr. Bourque.

Do you recall this letter?

A. Yes.

Q. Can you identify any of the handwriting that is written on it?

A. Some of it.

Q. Would you, first referring to the circle and the "okay" on sort of the mid right, do you know who wrote that?

A. I am not sure.

Q. What about the writing in the lower left-hand corner?

A. I am not sure.

Q. Do you recognize the writing at the very top?

A. Yes.

Q. What is that?

A. That is my writing.

Q. Would you read it?

A. It says "4/8/91-."

Q. And then what?

A. "VN to Ret Call."

Q. What does that mean?

A. Vince Notaro to return call.

Q. At the time this was written, do you understand this to be the agreement relating to the price terms between TDI and Amtrak for the Penn Station Spectacular?

MR. SLATTERY: Objection to the extent it calls for a legal conclusion. The document speaks for itself.

Let me remind the witness to the extent he can answer the question without relating to the specific price terms, that would make our lives easier.

MS. PHARES: Yes.

(The pending question was read.)

THE WITNESS: This letter sets forth the proposal.

BY MS. PHARES:

Q. Do you understand that that proposal was ever agreed to? Do you know whether it was ever agreed to?

A. To the best of my knowledge it was agreed to.

Q. Do you know in what document it was agreed to, if any?

A. No, I don't remember.

MS. PHARES: Could you read back the last question and answer.

(The record was read as requested.)

BY MS. PHARES:

Q. Do you know if this is the document that sets forth the current compensation for Amtrak from TDI for The Spectacular?

MR. KOHANE: Objection.

MR. SLATTERY: Same objections, but you can answer the question.

THE WITNESS: I don't think so. I don't think this is the one.

BY MS. PHARES:

Q. Do you ordinarily, Mr. Bourque, are you the signatory for Amtrak on a contract that sets price terms with TDI for advertising?

A. Am I the signatory?

Q. Yes.

A. Signatory, meaning I sign it.

Q. That's right.

A. No.

* * *

[43:2 - 44:15] Q. You said earlier you have responsibility for advertising at Penn Station; correct?

A. Some responsibility.

Q. What is the responsibility?

A. My responsibility relates to—on The Spectacular, just The Spectacular?

Q. No. I am asking in general.

A. My role with respect to The Spectacular is the approval of copy and to approval of the business terms.

Q. When you say the business terms, like the financial terms we were just describing.

A. Yes.

Q. Do those terms relate only to The Spectacular or to all advertising?

MR. SLATTERY: Objection, ambiguous.

You can answer it.

THE WITNESS: Financial terms—say that again, please.

BY MS. PHARES:

Q. Does your responsibility relate to the financial terms just with regard to The Spectacular or does it also include the financial terms with respect to what I will refer to as non-Spectacular advertising?

A. Just The Spectacular.

Q. Who is responsible for the financial terms of the non-Spectacular advertising?

MR. SLATTERY: Objection, foundation.

MR. KOHANE: Objection, foundation.

MR. SLATTERY: And ambiguous.

BY MS. PHARES:

Q. If you know.

A. I don't know.

* * *

[50:18 - 56:16] Q. It is correct, is it not, or is it your understanding that TDI arranges for the placement of advertising in Penn Station in spaces operated by Amtrak; is that correct?

A. Yes, generally, I think that is correct.

Q. Does TDI send you copies of that, of the artwork or of the copy of any of that advertising for review?

MR. SLATTERY: Wait a second. Anywhere in Penn Station?

MS. PHARES: Anywhere in Penn Station that Amtrak controls.

MR. SLATTERY: Including the Spectacular?

MS. PHARES: Aside from The Spectacular.

THE WITNESS: Aside from The Spectacular.

BY MS. PHARES:

Q. And the manned exhibits.

A. Aside from The Spectacular and the manned exhibit, no.

Q. Is there a regular procedure for review of the copy and the artwork for The Spectacular?

A. Yes, generally I would present it to Tony DeAngelo for the approval for review and approval.

Q. Let's slow down a little bit. Is there a regular procedure for how you receive the material?

MR. KOHANE: Objection.

Foundation. He can obviously speak from his side.

Q. How do you receive the work that you approve, Mr. Bourque?

A. Generally TDI sends me the copy.

Q. For our purposes, do you mean copy to mean both the writing, any written material and any artwork?

A. Generally, I mean when I say copy, everything, the whole thing.

Q. Everything, okay.

How does TDI generally send it to you?

A. Generally through the mail.

Q. What do you do when you receive it?

A. Generally, I review it with Tony DeAngelo.

Q. Do you make an initial review by yourself.

A. What do you mean by "initial review"?

Q. Do you review it by yourself without first consulting Mr. DeAngelo?

A. When the letter comes in, I look at it. Is that what you mean by an initial review?

Q. When it first comes in and you look at the letter, do you look at what is attached to it?

A. Generally, before I would present it to Mr. DeAngelo, I would look at what it is.

Q. Do you formulate your own recommendation about whether or not to accept the advertising?

A. I provide my thoughts to Mr. DeAngelo.

Q. How do you provide your thoughts to Mr. DeAngelo?

A. Sometimes verbally, sometimes—primarily verbally.

Q. Do you ever provide it to Mr. Pross?

A. Mr. Pross has been in his position for about a year. During that time I don't recall there being any copy.

Q. Typically, you just confer with Mr. DeAngelo?

MR. SLATTERY: Just to clarify, you are asking him what his previous practice has been?

MS. PHARES: Yes.

MR. SLATTERY: Okay.

THE WITNESS: Prior to Mr. Pross, I think that prior to Mr. Pross that there were instances when I would present it to, say, to Mr. LaCroix who would then present it to Mr. DeAngelo.

BY MS. PHARES:

Q. When you say there were instances, was that your regular procedure?

A. Generally, I would present it to—generally Mr. DeAngelo would make the final decision.

Q. Did you ever use a form to make your recommendation?

A. What do you mean by "form"?

Q. I mean, for example, something that sets out the particular thing being reviewed that notes line for approval authority that includes your recommendation, maybe a short discussion of the particular contract and its terms?

A. I think I did that prior to the A&S being approved.

Q. Do you recall why you stopped doing that?

A. That was at the start of a contract.

Q. Do you usually do that at the start of a contract; prepare such a form?

A. I am not sure, I don't recall.

Q. Do you recall preparing such a form at the beginning of the contract with A&S?

A. I am not sure.

Q. Do you maintain files in your office—let's stop. Before that, when Mr. DeAngelo makes his final decision, how is the

decision recorded? Is there a memorandum that indicates he has approved or not approved?

MR. SLATTERY: Objection, assumes facts not in evidence. You can answer the question.

THE WITNESS: Generally, we advise TDI.

BY MS. PHARES:

Q. So, just to hurry this up, your letter to TDI then is the only record of the decision that has been made by Amtrak?

MR. SLATTERY: Wait a second. I hate to slow things down, but I have the same objection.

THE WITNESS: It might be a phone call. It wouldn't necessarily be a letter.

BY MS. PHARES:

Q. So if there is no letter to TDI, then there is no written record at Amtrak as to whether or not Amtrak has approved an advertisement?

A. I am not sure.

Q. When you discuss a particular advertisement with Mr. DeAngelo, do you, is it your practice to show him the copy?

A. Yes.

* * *

[57:15 - 63:22] MS. PHARES: I would like to mark for identification a document dated August 20, 1987 entitled Justification of Spectacular Sign Agreement to A&S Stores.

And as 38, a letter dated September 14, 1987 from Vincent Notaro to Bruce Bourque.

(Plaintiff's Deposition Exhibit-Nos. 37 and 38 were marked for identification. Exhibits retained by counsel.)

BY MS. PHARES:

Q. Mr. Bourque, is Plaintiff's Exhibit 37 the kind of form that you described earlier that you used when preparing a recommendation for new contract for The Spectacular?

A. Generally, yes.

Q. This document has comments on a second page; is that correct?

A. Yes. This is generally—

Q. —the way you prepare recommendations for a new contract?

A. Yes.

Q. Does the comment section ever exclude comments on the copy?

MR. SLATTERY: Are you asking if it has ever been included in any such form he prepared?

THE WITNESS: I don't know.

BY MS. PHARES:

Q. You don't remember?

A. I don't remember.

Q. If you would look at Plaintiff's Exhibit 38, I am just going to use as an example the kind of transmittal letter you described earlier you receive from TDI.

MR. SLATTERY: Objection. The document speaks for itself.

You can answer it.

THE WITNESS: I don't remember this. Well, is this generally—

BY MS. PHARES:

Q. Yes.

A. Generally, I would say this is what TDI sends.

Q. Although we have clarified this at another deposition, this letter says Winston Network.

Do you understand Winston Network to be the same organization we refer to as TDI?

A. I would defer that to counsel.

Q. Did Winston Network change its name in the time you have been at Amtrak?

A. I am not sure.

Q. Well, have you always dealt with either an organization named Winston Network or TDI?

A. Yes.

MR. KOHANE: Or AMNI America.

THE WITNESS: Yes or AMNI.

BY MS. PHARES:

Q. When you review copy, you make your initial examination of copy that you receive from TDI, are there any advertising standards that you apply?

A. What is an advertising standard?

Q. How do you decide whether or not the copy should be approved?

A. Yes.

Q. There are advertising standards? Is that what you meant when you said "yes"?

MR. SLATTERY: I don't think the witness is finished answering the question.

THE WITNESS: Yes, we have standards. I am not sure if you call them advertising standards.

BY MS. PHARES:

Q. Fair enough. What are the standards?

A. Well, for The Spectacular, we are very concerned about a number of things because of its large size and its influence over the station.

Q. What are the factors?

A. Political. We don't accept political ads, pornographic, competitors.

Q. Anything else?

A. Beyond that, we are concerned with the appearance.

Q. Anything else?

A. What was the question?

Q. You told me there were a number of factors that influence—

A. My initial thinking?

Q. I was just asking you what those were.
A. My initial look-see. Yes.
Q. Are these guiding factors, are they written anywhere?
A. Yes. Generally.
Q. Where?
A. They are written in the 1980 agreement, to the best of my knowledge.
Q. Have you ever looked at the 1980 agreement?
A. Yes.
Q. Have you looked at the 1980 agreement before this litigation?
A. Yes.
Q. When?
A. I don't recall.
Q. Why did you look at the 1980 agreement?
A. I looked at the agreement—I looked at all the agreements when I joined Amtrak.
Q. Did you ever look at the agreement after that?
A. I looked at agreements at other times to clarify, not referring to this one in particular.
Q. I am referring just to the 1980 agreement.
A. Just to the 1980 one?
Q. Right.
A. I don't recall.
Q. So you read the 1980 agreement when you joined Amtrak?
A. Yes, at some point after that.
Q. Do you know at what point after that?
A. I don't recall when.
Q. When did you start reviewing advertising copy?
A. I don't recall.
Q. Well, did you review advertising copy when you were a project manager?
A. I think so. I think so.
Q. Who told you to read the 1980 agreement?
MR. SLATTERY: Objection. That assumes facts not in evidence.

Q. If anyone?
A. I don't recall anybody particularly telling me to read specifically any agreement, but as part of my job I read, you know, I tried to read all the agreements. Not all—
Q. You joined Amtrak in 1984; is that correct?
A. Yes.
Q. The 1980 agreement was in effect when you joined Amtrak; is that correct?
A. Yes.

* * *

[65:21 - 66:21] Q. Is there any other place besides the 1980 agreement where the factors you referred to are written down?
A. Could you repeat the question, please.
(The pending question was read.)
THE WITNESS: Prior to the—do you mean prior to or after the 1980 agreement?

BY MS. PHARES:

Q. After the 1980 agreement.
A. No, not to my knowledge.
Q. And is the only way you learned about the factors guiding your decision from the 1980 agreement?
A. I don't recall.
Q. Have you ever discussed the factors guiding your decisions with anyone at Amtrak?
A. I don't remember.
Q. Have you ever discussed it with Mr. DeAngelo?
A. I am sure at some point, but I don't recall when.
Q. Do you recall what you said, what as discussed?
A. No, I don't. No.

* * *

[107:9 - 122:15] Q. Were you involved in the review of the advertisement that is at issue in this lawsuit?
A. Yes.

Q. I am going to show you what has already been marked as Plaintiff's Exhibit 5.

Have you ever seen this letter before?

A. Yes.

Q. Is this the letter by which TDI transmitted Mr. LeBron's copy to you?

A. Yes.

Q. The letter states on its face that it was sent by Federal Express.

Do you recall when you received the letter?

A. No, not exactly.

Q. Does the date stamp at the top, is that stamped onto documents in your department when they are received?

A. Yes.

Q. So, can we assume it was received on December 8th, 1992?

A. Well, I was out of the office on that day.

Q. Is it customary or is the procedure in your office for documents to be stamped when they are received or only when you are in the office?

A. When they are received.

Q. Do you recall when you first saw the letter?

A. I think that I saw the letter on the 9th.

Q. When you received the letter, did it include a copy and the artwork, whether together—I think they were separate?

A. I think it did.

Q. You think it did or you don't—

A. No, I think it did. Yes.

Q. Did you prepare a justification form like the one we looked at earlier that you prepared for A&S on Plaintiff's 37?

A. No.

Q. Why not?

A. Typically—well, generally, that form is used—generally that form is used after there has been an initial approval.

Q. What do you mean by that?

A. Can I see the form?

Q. Yes. Sure. It should be here, actually.

A. Well, in this case, given the time frame, the review period, I did not do a form like this.

Q. Is that why you didn't do a form like this?

A. The time period.

Q. What was the time period?

A. The shortness of it. The proposed start date of the advertisement.

Q. When was the proposed start date?

A. I think the start date was January 1 of 1993.

Q. On December 9th it would take you a lot of time to prepare a justification form; is that it?

A. I probably—I don't recall doing anything with this on December the 9th. I was out of the office on the 10th and 11th.

Q. When do you recall doing anything this with form, this letter and application?

A. On or about the 14th or 15th of December.

Q. From December 9th to December 14th or 15th, did you receive any calls from Tina Haut, the general counsel at TDI?

A. I am not sure.

Q. Did you receive any calls from Tina Haut in December in connection with this approval?

A. Yes.

Q. Do you know when they were?

A. No.

Q. Do you know how many calls you received?

A. No.

Q. Was it more than three?

A. I am not sure.

Q. Well, was it more than five?

A. I am not sure.

Q. Was it more than once?

A. It was more than once.

Q. What did she tell you when she called?

A. She was trying to get me to speed up the review process.

Q. Did she tell you why?

MR. SLATTERY: Since the witness answered before I had a chance to object, let me say I object to that question to the extent it seeks to elicit hearsay.

Q. Did she tell you why?

MR. SLATTERY: Same objection.

THE WITNESS: I am not sure if she did or not.

BY MS. PHARES:

Q. What did you tell her?

A. I said that I would. I said that I would, you know, do what I could.

Q. Mr. Bourque, do you know what an advertiser has to provide to TDI to put up in The Spectacular?

A. No.

Q. Do you know how long It takes to prepare it?

MR. SLATTERY: Objection, no foundation.

THE WITNESS: No.

MR. KOHANE: And form.

MR. SLATTERY: And ambiguous.

BY MS. PHARES:

Q. What happened on the 14th or 15th?

A. I brought the materials, the agreement and letters that I received from Tina Haut, to the law department.

Q. Is that a standard procedure?

A. In letters where cases are cited and they are coming from lawyers, then I would bring them to the law department.

Q. Did the material that Tina Haut sent you include letters?

A. Yes.

Q. Do you know who the letters are from?

A. Do I know? They came from attorneys for Mr. LeBron.

Q. Was it more than one letter?

A. Yes.

Q. Do you remember how many letters there were?

A. I think there were two letters.

Q. Were there any letters in that, aside from the transmittal letter from Ms. Haut, were there any letters of Ms. Haut's included in the materials you received?

A. Aside from—

Q. Aside from Plaintiff's Exhibit 5 you have before you.

A. Yes.

MR. KOHANE: If I may, these other letters, I assume, were not included in the same—if you don't want to answer that question, don't. I assume they were not included with her original December 7th letter?

THE WITNESS: No. No.

MS. PHARES: That is what I understood.

THE WITNESS: No, sorry.

BY MS. PHARES:

Q. How did you receive these other letters, Mr. Bourque?

A. The other letters were sent to me by TDI.

Q. When were they sent?

A. I think they were sent on the 14th by fax.

Q. Why were they sent?

MR. KOHANE: Objection.

Q. Did someone ask for the letters? Did you ask TDI to send letters?

MR. SLATTERY: We have three pending questions.

MS. PHARES: I beg your pardon.

MR. SLATTERY: Which question do you want to have him answer so I know which one I should consider objecting to?

BY MS. PHARES:

Q. How did the letters come to be sent to Amtrak?

MR. KOHANE: Objection to the form of the question.

MR. SLATTERY: Objection, ambiguous.

MR. KOHANE: Calls for speculation.

MR. SLATTERY: And calls for speculation.

MR. KOHANE: I think whether he asked for the letter is a better one.

BY MS. PHARES:

Q. Did you ask for the letters?

A. I don't recall.

Q. In your conversations with Ms. Haut, did she tell you there were any letters?

MR. SLATTERY: Objection, ambiguous and to the extent that it calls for hearsay.

THE WITNESS: I don't remember.

BY MS. PHARES:

Q. Let me see if I can reconstruct. On December 7 you received Plaintiff's 5 with the attachments, Mr. LeBron's copy?

MR. SLATTERY: That mischaracterizes the witness' testimony.

Q. On December 8th it was received at Amtrak. On December 9th you saw it?

A. Right.

Q. On December 14th you took that material plus these letters that you have now described to the law department?

A. Yes.

Q. But you don't have any idea how those letters came to be transmitted to Amtrak?

MR. KOHANE: Objection. Hold on.

Q. You said they were sent by fax.

MR. KOHANE: Can we go off the record?

MS. PHARES: Yes.

(Discussion off the record.)

BY MS. PHARES:

Q. Did you ask Ms. Haut to fax the letters to you?

A. I don't recall.

Q. Did the letters come from Ms. Haut?

A. Yes, I think so.

Q. Do you have any question about it?

MR. SLATTERY: Objection. There is no foundation. It calls for speculation.

MR. KOHANE: They appear to; is that right?

THE WITNESS: They appear to.

BY MS. PHARES:

Q. Who did you take them to in the law department?

A. Maria Green.

Q. I am not interested in your conversations with Ms. Green or the substance of them.

Did you discuss the matter with Ms. Green on December 14th or 15th?

A. Yes.

Q. Did you discuss the matter with anyone else on December 14th or 15th?

A. I may have mentioned it in passing to Don Pross.

Q. Do you recall what you said to Mr. Pross?

A. No.

Q. Do you recall what he said to you?

A. No.

Q. Did you show the material to Mr. Pross?

MR. SLATTERY: I don't think we established he even had a conversation with Mr. Pross.

Q. When you say you mentioned it in passing to Mr. Pross, what do you mean?

MR. SLATTERY: Mischaracterizes the witness' testimony.

MR. KOHANE: Objection.

THE WITNESS: It means if I did, if I talked to him at all, it was probably just to say that I had gotten a proposal in that I brought it over, you know, that and the agreement over to the law department.

That is if I mentioned it.

Q. I understand.

What, if anything, happened after that, after December 15th or—14th or 15th?

MR. SLATTERY: Other than the filing of this lawsuit?

MS. PHARES: Well, I mean lots of things happened after that, but what in connection with this advertisement?

THE WITNESS: I don't think anything happened until the 17th.

BY MS. PHARES:

Q. How do you recall it was the 17th?
A. We were in New York for meetings.
Q. Who is "we"?
A. Tony DeAngelo, myself, Don Pross and Maria Green.
Q. Was the matter raised on December 17th?
A. Yes.
Q. What were the circumstances?
A. We were at dinner.
Q. On December 17th?
A. Yes.
Q. Is that a Thursday, do you recall?
A. It seems to me it was a Thursday.
Q. Were all four of you at dinner?
A. Yes.
Q. Did you raise the subject?
A. Probably. Probably. I don't remember, but probably.
Q. What did you say and what did Mr. DeAngelo say?
MR. SLATTERY: Objection. No foundation.
You can answer the question.
THE WITNESS: It seems to me what, you know, what I remember was that I showed him the materials. He said that the advertisement was political and that, you know, it should be rejected on that basis.

BY MS. PHARES:

Q. Now, I have two questions.
First, when you saw the advertisement did you think it was political?
A. My initial reaction was that it was political.

Q. So on that ground, did you decide our recommendation was that it not be accepted by Amtrak?
A. That was my initial thinking.
Q. On the 14th and 15th, when you took the matter to the law department, did you still think it was political?
A. I suppose I did. I really hadn't given any more thought to the political content on that.
Q. In any of your calls with Ms. Haut, did you indicate to her that there was going to be a problem with the advertisement because it was political?
MR. SLATTERY: Objection, ambiguous.
THE WITNESS: I don't recall. What are we talking about? What period are we talking about?

BY MS. PHARES:

Q. Well you weren't sure when Ms. Haut called?
A. Right.
Q. Whenever she called, during those telephone calls about the need for haste on the decision.
A. It seems to me after we made the decision we called Ms. Haut.
Q. That is the first time you told her?
A. I don't recall. I think so.
Q. When you showed the material to Mr. DeAngelo, did you say to him that you thought that you recommended it not be accepted because it was political?
A. Well, again, I don't remember, but I think what I did was I probably showed him the materials.
Q. When you say "the materials," what did you show him?
A. The copy.
Q. Anything else?
A. The letters.
Q. What did Mr. DeAngelo say to you?
A. Mr. DeAngelo said that he thought it was political.
Q. Did he say why?
A. I don't recall him saying why. I don't remember.

Q. Did he tell you should do anything about the application for approval?

A. He said that we should reject the application.

* * *

[125:4 - 127:20] Q. After Mr. DeAngelo made his decision about Mr. LeBron's advertisement at dinner on the 17th, what did you do?

A. A letter was prepared.

Q. Who prepared the letter?

A. It was prepared by the law department.

Q. Do you know who in the law department prepared it?

A. Yes. Maria Green.

Q. Was it decided at the dinner that Maria Green would prepare the letter or did you ask Maria Green to prepare the letter?

I will ask the first one.

MR. SLATTERY: It is two questions.

MS. PHARES: I will re-ask it.

BY MS. PHARES:

Q. Was it decided at dinner that Maria Green would prepare the letter?

A. I don't recall.

Q. Do you know, did you offer to prepare the letter?

A. I don't recall.

Q. Did Maria Green discuss the letter with you?

MR. SLATTERY: Let me just instruct the witness—

MS. PHARES: Sorry, yes.

BY MS. PHARES:

Q. I am not asking for what she said to you, Mr. Bourque. I am just asking whether she discussed it with you.

MR. SLATTERY: All she is asking for is a yes or no answer.

THE WITNESS: Yes.

BY MS. PHARES:

Q. When?

MR. SLATTERY: You can answer that question.

THE WITNESS: On or about December 21st through 23rd.

BY MS. PHARES:

Q. Monday through Wednesday before Christmas; is that correct?

A. That's right.

Q. I am going to show you what has been already marked as Plaintiff's 6. Is that the letter?

A. Yes.

Q. When is the first time you saw the letter?

A. I don't recall exactly.

Q. Who signed the letter, if you know?

A. Yes, I do know.

Q. Who signed it?

A. John Turpin signed for Tony DeAngelo.

Q. Do you know if Mr. Turpin discussed the letter with Maria Green?

MR. SLATTERY: Again, you can simply answer yes or no to this question and that should be the extent of your answer, if you know the answer to it.

THE WITNESS: No, I don't know.

* * *

[142:5 - 147:2] Q. Earlier when we began, Mr. Bourque, you said that your responsibilities included working with other railroads at Pennsylvania Station.

A. Yes.

Q. What does that include, what do you mean "working with"?

A. If there is construction work that they want to do that Amtrak reviews and approves.

Q. What other railroads do you refer to when you said that?

A. Long Island Railroad. New Jersey Transit, to some extent.

Q. Anything else?

A. Any other railroads?

Q. Or transportation systems?

A. I don't recall any other transportation systems.

Q. Why do you say the New Jersey Transit to some extent?

A. Because there has been more work related to the Long Island Railroad.

Q. What kind of work have you coordinated with the Long Island Railroad?

MR. SLATTERY: Objection. The question is ambiguous and assumes facts not in evidence.

THE WITNESS: They are making improvements to the station.

BY MS. PHARES:

Q. When you say that, you mean that the Long Island Railroad is making improvements on the A level of the station; is that what you mean?

A. Yes, they are making improvements on the A level, but some of the work requires work to be done in the Amtrak premises.

Q. Can you give me an example?

A. Yes. An example would be an escalator that goes from the Amtrak premises to the Long Island Railroad premises.

Q. Anything else?

A. Yes. There would be piping, ducting.

There would be, for example, wiring, perhaps. There might be asbestos removal.

There might be an impact to traffic, to pedestrian traffic, as an entrance is closed off, for example, or narrowed as a result of construction.

Q. What would be your role in that kind of a problem?

A. Working with the Long Island to, you know, get the plans and disseminate the plans for review. Addressing objections. Working with the Long Island Railroad for any agreements that would be needed to formalize a consent.

Q. Agreements that would be needed to formalize the consent, consent by whom?

A. Consent by Amtrak to work in its premises by Long Island Railroad.

Q. Has the Long Island Railroad made changes on the A level where it is located requiring this kind of cooperation?

A. Yes.

Q. Does it go on on a continuous basis?

MR. SLATTERY: Objection, ambiguous.

Q. Well, when is the last time you had to cooperate with the Long Island Railroad in such matters?

MR. SLATTERY: Objection. Ambiguous and assumes facts not in evidence, not in the record.

THE WITNESS: Last week.

BY MS. PHARES:

Q. You say you come to Penn Station on a weekly basis.

Do you have occasion on each of your visits to handle coordination matters with the Long Island Railroad?

MR. SLATTERY: Objection, mischaracterizes the witness' testimony.

Answer it.

THE WITNESS: No, I don't work with the Long Island, you know, not every time I come up.

BY MS. PHARES:

Q. Can you give me a ballpark figure of how often?

A. No. Because it depends.

Q. You mean sometimes it might be all the time and sometimes not at all?

A. It depends on what work they are doing.

Q. Are they doing any work now?

A. Yes.

Q. What is it?

A. I really can't speak about, I don't have the knowledge to speak about their work.

Q. Are they doing any work that requires your coordination?

A. Yes.

Q. What are you doing in connection with the work that the Long Island Railroad is going?

A. What am I doing? Finding out what work needs to be done.

Q. The lease with the Long Island Railroad was made what, about four years ago; is that correct?

A. Yes.

Q. At that time were there any particular projects that required your coordinating real estate efforts with the Long Island Railroad?

* * *

[147:20 - 149:9] THE WITNESS: Yes.

BY MS. PHARES:

Q. What were they?

A. The assignment of leases.

Q. Anything else?

A. Termination of leases.

Q. Anything else?

A. Review of planned work.

Q. Anything else?

A. There was property management issues.

Q. By that you mean, I am just referring to earlier, the coordination with security, cleaning, maintenance; anything else?

MR. SLATTERY: Let me just state, since we had a very lengthy deposition, I do not recall whether that properly characterizes your testimony. If it doesn't characterize your earlier testimony, you should let Ms. Phares know that.

THE WITNESS: Yes, okay.

BY MS. PHARES:

Q. When you said review of planned work, what was the work that the Long Island Railroad was planning that required your review?

A. My recollection is that it involved air conditioning improvements, concourse improvements, probably ticketing improvements, escalator and stairway improvements.

Q. When you say "review," do you mean review in order to carry out the coordination between Amtrak and Long Island Railroad?

A. It means review in that some of the work involved permanent and/or temporary intrusions into the Amtrak premises. And/or would affect retail tenants.

Q. Do you—

A. And/or Amtrak's passengers.

* * *

[150:5 - 150:23] Q. Does the review you were describing, I am just not quite sure what you mean by that, does that also include a sense of approval of the planned work?

MR. SLATTERY: Note my prior objections to that.

You can answer the question.

THE WITNESS: Well, the purpose would ultimately be to approve work.

BY MS. PHARES:

Q: If they proposed something that didn't quite fit, you might go back and suggest an alternative, but the idea was to come up with something that would work; is that a fair characterization?

A. Yes. Basically to the extent they would propose work and we would voice objections to it and address those objections prior to any approval.

* * *

[155:4 - 159:16] Q. Do you recall just at the end of our conversation that you listed types of work that—I want to be careful, I don't want to mischaracterize, but there was a list of work, escalator, piping, ducting, wiring, asbestos removal that you described as examples of coordination with the LIRR?

A. Right. Construction coordination.

Q. Construction coordination?

A. Right.

Q. What I would like to ask you, are these examples that have occurred and if you would like, I can read the list so you can say yes or no?

A. The Long Island is the in the midst of a construction program. So some of the work probably has or will occur.

Q. When you said construction coordination, you were meaning to distinguish it from what other kind of coordination?

A. Real estate coordination.

Q. Do you have real estate coordination problems with the Long Island Railroad?

A. These aren't problems. They are just work—

Q. Issues?

A. Not even necessarily issues. Just work activities.

Q. Do you have real estate coordination work activity with the Long Island Railroad?

A. Yes.

Q. What is an example of that?

A. Well, for example, we terminated a retail store in the Amtrak premises so that the Long Island could construct an escalator.

Q. When did that happen?

A. What part?

Q. Well, for example, the termination of that lease?

A. The termination occurred, I am not sure exactly, within the last couple months, say.

Q. Can you give me an example of the kind of either, well, construction or real estate coordination work activities that

you have with the New Jersey Transit, with New Jersey Transit?

MR. SLATTERY: I think that assumes facts not in evidence, but you can answer it.

THE WITNESS: New Jersey Transit is contemplating work in the Amtrak premises that would affect, say, access to some retail stores, that might affect access.

BY MS. PHARES:

Q. That kind of a problem requires your input?

A. Input, yes.

MR. SLATTERY: Objection to the characterization.

Q. When you say—

A. Not a problem, just work.

Q. I didn't mean to say problem, whatever word that describes that as an activity.

When you say the New Jersey Transit is contemplating work in the Amtrak premises, are you referring to—what are you referring to?

A. Plans, review of plans.

Q. What kind of space, what is the nature of the space that New Jersey Transit occupies in the Amtrak premises?

A. The nature of the space?

Q. Yes.

MR. SLATTERY: Again, I am not sure that properly characterizes the witness' testimony.

You can answer it.

THE WITNESS: What kind of space does New Jersey Transit have in the Amtrak space?

BY MS. PHARES:

Q. Yes.

A. To the best of my knowledge, they have some locker space. They have, I am not sure. They have ticketing. They probably have storage space.

Q. Do you know if they have storage space?

A. Do I know?
Q. Yes.
A. No, I don't know.
Q. Is the work they are contemplating in the Amtrak premises in connection with their ticketing booths?
A. Not to my knowledge.
Q. Do you know what it is in connection with?
A. Yes.
Q. What?
A. They want to improve platform clearance times.
Q. How does their goal of improving platform clearance times relate to work in the Amtrak premises?
A. They want to construct an additional means of access from the platforms out of the station.
There may be other work they are planning, but that is the work I am most familiar with.

(At the conclusion of trial on January 27, 1993, Judge Pierre N. Leval directed each party to admit or deny the proposed findings of fact offered by the oppostion. Following his instructions, each party annotated the other side's submission. For the purpose of printing these documents, comments that the parties wrote in the margins are bracketed and follow the finding or the portion of finding to which they pertain. The parties' additions are underscored; the deletions are indicated by strike-outs.)

DEFENDANT AMTRAK'S PROPOSED FINDINGS OF FACT, INCLUDING PLAINTIFF'S ANNOTATED RESPONSE TO FINDINGS, ¶ 1-28

FINDINGS OF FACT

Nature of Amtrak and Its Ownership of Penn Station

1. Amtrak is chartered under the District of Columbia Business Corporation Act as a for-profit corporation. It has been in existence since 1971. *See* 45 U.S.C. § 541. **[Admit]**

2. The Real Estate and Operations Development Department of Amtrak is responsible for the profit making endeavors of the corporation outside of running the railroad. (DeAngelo Depo., pp. 8-9).[1] **[Admit]** Amtrak is not required to conduct its real estate operations in accordance with any federal law, other than those laws applicable to private business corporations. (DeAngelo Depo., pp. 164-165.) **[Deny Legal Conclusion; see Plaintiff's Findings ¶¶ 130-137.]**

3. Amtrak files a federal corporate income tax return with the United States government. (Exh. 9.) **[Admit]**

4. ~~Federal support for Amtrak covers approximately 20% of Amtrak's entire operating expenses. (Exh. 7, Inside Cover.)~~ **[Figures don't Reflect all federal subsidies]** Amtrak strives

[1] "DeAngelo Depo." refers to the deposition of Anthony DeAngelo, Amtrak's Vice President of Real Estate and Operations Development.

to be self-sufficient by the year 2000. (Report, Towards Self-Sufficiency in the Year 2000, dated June 1, 1991, Exh. K.) **[Admit]** ~~Amtrak's grant request to Congress for 1993 anticipates a reduction in federal support from 20% to 16.18%.~~ **[Figures don't Reflect all federal subsidies; see Plaintiff Findings ¶¶ 163-174, 177]** Amtrak Fiscal Year 1993 Grant Request and Justification, Exh. L, p. 4.) To the extent that Amtrak can increase its revenues through accepting commercial advertisements, it can decrease the amount it requests for a federal subsidy. (DeAngelo Depo., pp. 25, 132.) **[Admit]**

5. Although there are federal appointees on Amtrak's board, the only member of Amtrak's Board of Directors that is a federal employee is the United States Secretary of Transportation. (Exh. 7, p. 35.) **[Admit but all Board members are effectively chosen by the U.S.; see Plaintiff's Findings ¶ 113.]**

6. All preferred shares of Amtrak stock are held by the United States. Common shares are held by four private entities: The Grand Trunk Western Railroad Company; Burlington Northern Inc.; The Penn Central Corporation; and Soo Line Railroad Company. **[Admit; PX 86]**

7. Amtrak has its own telecommunication system, as its system is not tied in with that of the federal government. Additionally, Amtrak employees are not on a federal pay scale. Their retirement monies are paid into the Railroad Retirement Fund, as are the monies of all railroad employees. (DeAngelo Depo., pp. 144-145.) **[Admit]**

8. Penn Station was deeded from the Pennsylvania Tunnel and Terminal Railroad Company, a subsidiary of Penn Central, to Conrail, a ~~private~~ corporation which then conveyed the property to Amtrak, also a ~~private~~ corporation. (Exhs. 11, 12.)[2] **[Admit]** ~~The federal government currently is~~

[2] Numbered Exhibits are plaintiff's exhibits. Lettered Exhibits are defendants' exhibits. The parties have stipulated to the authenticity of all documents produced by Amtrak, TDI and plaintiff. (DeAngelo Depo., p. 154; Notaro Depo., p. 4.) ("Notaro Depo." refers to the deposition of Vincent Notaro, TDI's Senior Vice President of Franchise Development.)

~~involved to the limited extent that it holds a mortgage on the entire Northeast Corridor from Boston to Washington, including Penn Station.~~ **[see Plaintiff's facts ¶¶ 138-158, 169]** (DeAngelo Depo., p. 153.) The federal government also paid Penn Central for its properties, including Penn Station. (*Id.*, p. 162.) **[Admit]**

9. The Title Insurance Policy for Penn Station states that Amtrak owns the property in fee simple. (Amtrak's Fee Title Insurance Policy, August 10, 1988, Exh. M.) **[Admit]**

10. ~~Amtrak has complete control over the upper level of Penn Station. The New York City Transit Authority, Long Island Rail Road, New Jersey Transit and the Metropolitan Transit Authority have no power over Amtrak's use of that area.~~ (Gallagher Depo., pp. 162-163). **[Deny; Amtrak's use of property subject to leases, easements and other arrangements; see Plaintiff's Findings ¶¶ 191-208.]**

11. Amtrak operates Penn Station for multiple purposes, including to facilitate rail travel for its passengers and those of LIRR, NJT, and NYCTA, and commercial tenants at the station are ~~primarily~~ selected in part to serve the travelling public. (DeAngelo Depo. pp. 167-168, 199-200.) **[Admit; see Plaintiff's Findings ¶¶ 10, 11, 191-208]**

12. ~~The United States is not a party to any of Amtrak's advertising contracts for Penn Station, and there is no indication in any of these contracts that the United States exerts any influence over Amtrak's performance of these contracts.~~ (*See* Exhs. 2, 3, 4, 12.) **[Deny; U.S. - controlled Board exercises authority over advertising contracts; see PXX 58-60, 65, Plaintiff's Findings ¶¶ 59-62]**

13. Amtrak owns Penn Station and the Penn Station Spectacular. (DeAngelo Depo., p. 10; Exh. 18, p. 7; Exh. N.) **[Admit]**

Therefore, documents relied upon herein that were produced by any of the parties but were not marked as deposition exhibits have been lettered sequentially from the last defendant's exhibit marked at a deposition.

Amtrak's Advertising Policy and the Spectacular

14. The display at Penn Station known as the Spectacular is approximately 103 feet in length by 10 feet in width. It is located on the west side of the upper level of Penn Station. It is a curved structure that is lit up. **[Admit]** ~~and that dominates the main entrance into Amtrak's waiting room and ticket area.~~ **[Deny]** (Exh. F, p. 11; Exh. 54; DeAngelo Depo., p. 70.)

15. ~~Amtrak has a longstanding policy of not permitting political advertisements on the Spectacular.~~ (DeAngelo Depo., p. 48; Bourque Depo., pp. 61, 73, 74, 103.)[3] ~~Contrary to plaintiff's assertion that this policy was created only because of his advertisement, this policy dates as far back as 1967, when the Spectacular was constructed and 4 years before Amtrak came into existence.~~ (Bourque Depo., p. 61; Exh. 4, p. 12; Exh. 18, p. 5.)[4] ~~As a result of this policy, there never has been a political advertisement on the Spectacular.~~ (Notaro Depo., pp. 12-13, 17-18, 23-24, 37, 44, 54-55, 62-63; Exhs. 45, 48, 51, 52, O.) ~~This consistent policy is viewpoint neutral.~~ **[Deny; see Plaintiff's Findings ¶¶ 64-98]**

16. All advertisements and contracts for the Spectacular must receive prior approval from Amtrak. (DeAngelo Depo., p. 48; Haut Depo., pp. 51-52, 78; Bourque Depo., p. 51.)[5] Mr. DeAngelo makes the final decision whether to give such approval to an advertisement for the Spectacular. **[Admit]** (DeAngelo Depo., pp. 37, 48, 55.) Amtrak's prior approval policy is unique to the Spectacular. **[Admit]** ~~because of the~~

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[3] "Bourque Depo." refers to the deposition of Bruce M. Bourque, Project Director of Real Estate for Amtrak. [Admit] ~~Mr. Bourque is responsible for the financial terms of Spectacular advertising and for real estate matters at Penn Station.~~ (Bourque Depo., pp. 43-44.) **[Deny; See Plaintiff's Findings ¶¶ 59, 72.]**

[4] The 1980 contract between Amtrak and TDI (Exh. 4), ~~which refers to Amtrak's policy regarding political advertising,~~ was in effect when Mr. Bourque came to Amtrak in 1984. (Bourque Depo., p. 63.) **[Admit]**

[5] "Haut Depo." refers to the deposition of Tina Kowalsky Haut, TDI's general counsel.

~~Spectacular's dominant position in Penn Station, its brilliance in terms of candle power and its ability to reach 38% of Amtrak's passengers.~~ **[Deny]** (DeAngelo Depo., pp. 57-58.)

17. ~~Because the Spectacular is a unique, enveloping structure, it is reasonable for Amtrak to have policies specific to it.~~ **[Deny; not evidence]** (January 4, 1993 Hearing, pp. 23-24.) It is the most prominent display in Penn Station. (DeAngelo Depo., p. 70; Bourque Depo., p. 60.) Plaintiff concedes that ~~it is virtually impossible not to~~ one would definitely notice the Spectacular as one enters the Amtrak terminal from the escalators that are directly opposite it. (Lebron Depo., pp. 84-85; Exhs. 50A, 50B, 50C.)[6] **[Admit]**

18. ~~Amtrak defines political advertising as non-commercial advertising. Commercial advertising promotes a particular product or service.~~ (DeAngelo Depo., pp. 33-34; Bourque Depo., p. 73.) **[Deny; see Plaintiff's Findings ¶¶ 64-98]**

19. In order to ensure that it will not lose control over the content of the advertisements being displayed on the Spectacular, Amtrak has refused at least one request to lease the Spectacular and then sublease it to unidentified advertisers precisely because of this concern. (DeAngelo Depo., pp. 53-55.) **[Admit]**

20. ~~Amtrak's general policy is that it will not accept political advertising.~~ **[Deny; Practice Contradicts alleged unwritten policy.; see Plaintiff's Findings ¶¶ 94-98]** ~~As an example,~~ According to Gallagher, there were no political signs in Penn Station during the 1992 Democratic National Convention in New York City. (Gallagher Depo., pp. 109-110; *see* DeAngelo Depo., pp. 62-64.)[7] ~~It also is Amtrak's policy not to accept advertisements of its competitors, of pornography, of potentially controversial matters and matters that would be objectionable to Amtrak's riding public.~~ **[Deny; Practice Contradicts alleged unwritten policy.; see**

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[6] "Lebron Depo." refers to the deposition of plaintiff Michael A. Lebron.

[7] "Gallagher Depo." refers to the deposition of Michael J. Gallagher, Amtrak's Manager of Stations in New York.

Plaintiff's Findings ¶¶ 94-98.] These policies are not formally written~~, but are longstanding~~ and are known only to both Mr. DeAngelo and Mr. Bourque, ~~the~~ Amtrak employees responsible for real estate matters at Penn Station. (DeAngelo Depo., pp. 29-31, 48; Bourque Depo., pp. 61-64.) **[Admit; see Plaintiff's Findings ¶¶ 73.]**

21. Mr. DeAngelo stated Amtrak follows this policy because the Spectacular is an overwhelming structure and the first thing that many Amtrak passengers see when they enter Penn Station. Amtrak does not want to force its passengers to view advertisements on the Spectacular that they may deem offensive or divisive. (DeAngelo Declar., para 4.)[8] **[Admit]**

22. Although Amtrak does not have a prior approval policy for advertising displays other than the Spectacular, Amtrak can object to an advertisement after it has been displayed and can have it removed. (DeAngelo Depo., p. 63.) **[Admit]**

23. ~~In accordance with its policy limiting the types of advertisements that will be permitted in Amtrak facilities,~~ Amtrak has ordered the removal of an advertisement placed by a competing airline. (DeAngelo Depo., p. 72.) **[Admit]**

24. A kiosk, such as the one which contains an advertisement for the magazine "The Plain Truth," (which is located to the side of an escalator in front of the Spectacular), is significantly smaller than the Spectacular, ~~and less noticeable. For these reasons,~~ advertisements on kiosks are not subject to prior approval. (Lebron Depo., pp. 151-153; DeAngelo Depo., p. 58.) Mr. DeAngelo was unaware of the "Plain Truth" magazine advertisement. (DeAngelo Depo., pp. 77-79.) **[Admit]**

25. ~~There is no evidence that the government coerces or encourages Amtrak to bar political advertising on the Spectacular or plays any role in its decision to do so.~~ **[Deny;**

[8] "DeAngelo Declar." refers to the Declaration of Anthony D. DeAngelo, dated December 31, 1992, submitted with Amtrak's January 4, 1993 letter to Judge Mukasey, supplementing Amtrak's Memorandum of Law.

government Requires Amtrak to maximize Revenues thru private contracts and alleged policy against political advertising is driven by Revenue concerns.; see Plaintiff's Findings ¶¶ 79, 179]

26. Amtrak has ~~voluntarily~~ made the decision to permit opportunities for the dissemination of political messages through political speech, placards, soliciting and leafletting at Penn Station. It ~~accordingly~~ has developed regulations ~~on its own, without any federal or state directive,~~ concerning the exercise of free speech at Penn Station. These regulations allow individuals and groups to receive permits to engage in political speech with passengers and other users of the station, to display placards, distribute political literature and to solicit donations on behalf of political organizations. Permit holders must agree to abide by the regulations, which prohibit permit holders from leaving any display unattended. (Exh. 10, pp. 4, 7.) **[Admit; see PXX 10; Amtrak has no evidence of origin of policy]**

27. These regulations do not apply to advertising in Penn Station. (Gallagher Depo., p. 163.) Accordingly, there is (ILLEGIBLE). **[Admit]**

28. William Delaney has no responsibility for the use of the Spsectacular at Penn Station, ~~and therefore is not knowledgeable regarding Amtrak's policies concerning the Spectacular.~~ (Delaney Depo., pp. 19-20.)[9] Mr. Delaney does not, as part of his duties, review any proposed advertisements prior to their display in Amtrak facilities. (Delaney Depo., pp.

[9] ~~Moreover, any claimed admissions by Mr. Delaney, a Project Manager in Amtrak's Real Estate Department, allegedly summarized in Jonathan Bloom's affidavit in support of plaintiff's application for a temporary restraining order, must be disregarded because they were obtained in violation of the New York Code of Professional Responsibility, rules DR 7-103 and DR 7-104.~~ (Bloom Depo., pp. 49-51.) (Jonathan Bloom is one of plaintiff's attorneys.) ("Delaney Depo." refers to the deposition of William P. Delaney.) *See Garrett v. Nat'l R.R. Passenger Corp.*, No. 89-8326 (E.D. Pa. Aug. 14, 1990); Fed. R. Evid. 801(d)(2)(D). *See also Polycast Technology Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 625 (S.D.N.Y. 1990). **[Deny, and Plaintiff is not Relying on the Bloom Aff.]**

20-21.) With the exception of one instance in which he was' instructed by his supervisor, John Turpin, to arrange for the removal of an advertisement for an airline that competed with Amtrak because the advertisement violated Amtrak's advertising policies, Mr. Delaney has never been called upon to determine whether any advertising already in place in an Amtrak facility should be removed because no one has ever complained. **[see Plaintiff's Findings ¶ 8]** . (*Id.*, pp. 16-17, 32-34.) If such an issue arose, he would consult with Mr. Turpin, who reports to Mr. DeAngelo. (*Id.*, pp. 11, 32.) **[Admit but Delaney does Review displayed advertising; See Gallagher Dep. 51:18 - 52:11]**

Plaintiff's Dealings with TDI and Preparation of the Display Proposal

29. Whatever knowledge TDI had of Amtrak's ban on political advertising is irrelevant to Amtrak's policy because not only TDI but the plaintiff himself knew that their contract was subject to Amtrak's approval. (Haut Depo., pp. 16-17; Lebron Depo., p. 130.)

30. The contract between plaintiff and defendant TDI provides:

> "All advertising copy is subject to approval of TDI and the Transportation Facility concerned as to character, text, illustration, design and operation."

(Exh. F, p. 8.) Plaintiff understood these provisions of his November 30, 1992 contract with TDI. (Lebron Depo., p. 130.)

31. The contract between plaintiff and defendant TDI also provides:

> "If for any cause beyond its control TDI shall cease to have the right to continue the advertising covered by this contract, or if the Transportation Facility concerned should deem such advertising objectionable for any reason, TDI shall have the right to terminate the contract and discontinue the service without notice.

(Exh. F, p. 8.)

32. Plaintiff had seen a form of contract similar to the one he signed with TDI as early as 1983, when he contracted with TDI to display his work in the Washington, D.C. subway system. (Lebron Depo. pp. 125-126.) In entering the current contract with TDI, plaintiff relied, in large part, on his own prior experience with the terms of his earlier contract with TDI, (Lebron Depo., pp. 128-129), which had similar language regarding approval by TDI and the "Transportation Facility." (Lebron Depo., p. 126.)

33. Even if plaintiff did not initially know that the "Transportation Facility" referred to in his contract with TDI was Amtrak (Lebron Depo., p. 89), he still knew that the contract was subject to the "Transportation Facility's" approval of the copy. (Exh. F, p. 6.) Plaintiff never learned the identity of the "Transportation Facility" and never communicated with Amtrak regarding the advertisement. (Lebron Depo., p. 104.)

34. Plaintiff was informed by TDI's general counsel that Amtrak had the absolute right to approve or reject the copy. (Lebron Depo., p. 131; Exh. F, p. 20.)

35. The contract between Amtrak and TDI provides:

> "All advertising material, exhibit material, notices and advertisements, and their manner of presentation and design, shall be subject to approval by Amtrak, which may disapprove any such items at its own discretion."

(Exh. 2, Section 6; Exhs. 37, 38.)

36. Contrary to the allegation in ¶ 44 of plaintiff's complaint, TDI is an independent contractor, not Amtrak's agent. The contract between Amtrak and TDI specifically provides that TDI may not enter into contracts in the name of the "Transportation Facility." (Exh. 2, Section 1.) Indeed, while plaintiff alleges that Amtrak and TDI have an agent-principal relationship, Mr. Schwartz, the TDI account executive with

whom plaintiff was dealing, did not even know that Amtrak was the "Transportation Facility" referred to in the contract. (Lebron Depo., p. 89.) Amtrak is a TDI franchise. (Haut Depo., p. 12.) TDI pays Amtrak a percentage of the revenues it independently collects from Spectacular advertisers. (Exhs. 34, 35, 36.)

37. As far back as 1967, the Pennsylvania Railroad, the original owner of Penn Station, and TDI had a licensor-licensee relationship which expressly provided that TDI construct and maintain the Spectacular, at its own cost and expense, for sale of advertising space to advertisers. (Exh. 18.)

38. In August of 1992, when plaintiff contacted TDI, he did not describe the content of his proposed display. Plaintiff did not tell Mr. Schwartz that his work was political. (Schwartz Depo., p. 101.)[10] It was not until December 2, 1992, after his contract with TDI had been signed by TDI, that plaintiff finally revealed the specific content of his work. (Lebron Depo., p. 63; Exh. F, p. 19.) Plaintiff admits that his proposed display is controversial and that some people may be offended by it. (Lebron Depo., pp. 97-98.)

39. Plaintiff knew that "owing to the unusual nature of the work," TDI and/or Amtrak might not approve of his advertisement. (Lebron Depo., pp. 81-82; Exh. F, p. 19.) He also knew that "this was not your typical advertisement, and that it was quite likely that TDI would have some questions about it." (Lebron Depo., p. 75.)

40. Although he was asked repeatedly by TDI about the nature of the work and to submit copy, the first time anyone at TDI knew the specific content of the advertisement was when plaintiff forwarded the copy to TDI on December 2, 1992. (Lebron Depo., pp. 53, 62-63.) However, plaintiff's own lawyers reviewed the advertisement with a "fine tooth comb" at least four times over a period of a few months

[10] "Schwartz Depo." refers to the deposition of William B. Schwartz.

before giving it the "Green Light". (Lebron Depo., pp. 66-68; Exh. F, p. 19.) When Mr. Schwartz of TDI finally saw the advertisement, he was surprised by its content. (Lebron Depo., pp. 93, 203-204; Schwartz Depo., p. 111.)

Amtrak's Timely Rejection of Plaintiff's Proposal

41. Amtrak notified TDI of its decision to reject the advertisement in a timely manner, at the latest on or prior to December 23, 1992. (Exh. 6.) (Bourque Depo., pp. 130-131.) Mr. Bourque, who initially sees the copy of Spectacular advertisements submitted for Amtrak's approval, was not in the office when the copy of plaintiff's advertisement was received on December 8, 1992, nor was he in the office on December 10, 11, or the morning of Monday, December 14, 1992. (Bourque Depo., pp. 108, 110, 124.) While Mr. Bourgue glanced at TDI's letter (Exh. 5) on December 9, he did not examine it until the following week. (Bourque Depo., p. 110.) Therefore, Amtrak had no knowledge regarding the nature of plaintiff's advertisement until Mr. Bourque reviewed the copy from TDI on December 14 or 15, 1992.

42. When Mr. DeAngelo, who has final approval on Spectacular advertisements, was advised of plaintiff's advertisement on December 17, while in New York City with Mr. Bourque, he rejected it. (DeAngelo Depo., p. 112; Bourgue Depo., pp. 119-120, 122.) Mr. DeAngelo is not sure he saw plaintiff's display before he disapproved it. It was described to him and he was told that it was non-commercial. He rejected it on that basis. (DeAngelo Depo., pp. 112-114). He did see a small representation of plaintiff's proposed display at a later time. (DeAngelo Depo., p. 113; Exh. G.)

43. Mr. Bourque did not return to his office until midafternoon on Friday, December 18, 1992. (Bourque Depo., pp. 160-161.) Amtrak's decision was communicated to TDI the following week. (Bourque Depo., p. 130.)

44. It normally takes at least 30 days for Amtrak to review ad copy for the Spectacular and then inform TDI of the decision. (Bourgue Depo., p. 161.) For example, in 1983, TDI

submitted copy for a Fujitsu commercial display for Amtrak's approval 29 days before the proposed installment date. Almost one month after the installment date had passed, Amtrak had not yet approved the advertisement. Amtrak lost revenue as a result of the delay. (Exh. 48.)

Reasonableness of Amtrak's Disapproval

45. Amtrak's long-established policy prohibiting political advertising is consistent with Amtrak's desires to create an environment conducive to the travelling public and to maintain and increase the number of its customers by not offending them. (DeAngelo Depo., pp. 29-31, 33-34, 48, 167-168, 199-200, 297; Bourque Depo., pp. 61, 73-74, 103; DeAngelo Declar., ¶ 4.)

46. As noted above, the Spectacular, a 103-foot long illuminated sign, dominates the upper level of Penn Station. (DeAngelo Depo., p. 70; Bourque Depo., p. 60.) There is nothing comparable to it in Penn Station. (Notaro Depo., pp. 10-11, 19.)

47. There are other legitimate reasons for Amtrak's policy against political advertising. For example, plaintiff himself recognized that there could be some difficulty with TDI approving the contract because the advertisement depicted a Coors beer can as a missile heading toward a number of rural Nicaraguans and therefore that Coors might claim the advertisement is libelous and a trademark infringement. (Lebron Depo., pp. 181-182.) Plaintiff was concerned that Coors might try to suppress his work if it discovered the advertisement before it was displayed. (Lebron Depo., pp. 189-190.)

48. Plaintiff was concerned .hat Coors might consider the advertisement defamatory. He spoke with his friend, Russ Bellant, the author of a book on Coors' philanthropy, (Lebron Depo., p. 70), and with his own attorneys, about this possibility. He did this partly because he did not want himself, TDI or the "Transportation Facility" to be sued for defamation. (Lebron Depo., pp. 153-156.) Plaintiff's own lawyers reviewed his proposal for several months to see if it was

libelous. (Lebron Depo., pp. 66-68; Exh. F, p. 19.) It is not unreasonable to assume that Coors would sue for libel based on the nature and content of plaintiff's advertisement.

49. Coors has in the past sued for libel where the Company was said to be associated with "ultra-right wing" causes such as the Ku Klux Klan. *Adolph Coors Co. v. Movement Against Racism and the Klan*, 777 F.2d 1538 (11th Cir. 1985). Plaintiff's advertisement associates Coors with these same causes. (Exh. G.)

50. Plaintiff also was concerned that the advertisement not be an infringement of Coors' trademark. (Lebron Depo., p. 179.) Plaintiff's display includes both Coors' trademark and trade name. (Exh. G.)

51. Coors has in the past sued successfully for trademark infringement. *Adolph Coors Co. v. A. Genderson & Sons. Inc.*, 486 F. Supp. 131 (D. Col. 1980); *Adolph Coors Co. v. Korr's Beer Distributing, Ltd.*, No. 77-1557 (6th Cir. June 21, 1979). *See also Adolph Coors Co. v. A&S Wholesalers, Inc.*, 1975 Trade Cas. (CCH) P60,187 (Feb. 27, 1975). It is not unreasonable to assume that a similar suit reasonably could be filed if plaintiff's artwork was displayed.

Plaintiff Has Suffered No Damages Based Upon Any Conduct By Amtrak; Plaintiff's Own Acts Caused Any Loss He Has Suffered

52. In the fall of 1991, plaintiff and his co-workers decided among themselves that the Spectacular should be the site for his work. (Lebron Depo., p. 44.) Plaintiff did not speak directly to Mr. Schwartz regarding the Spectacular until the spring of 1992. (Schwartz Depo., p. 66.) Plaintiff began designing the advertisement for the Spectacular in June 1992 (Lebron Depo., pp. 103-104), yet TDI did not sign the contract with plaintiff until November 30, 1992. (Lebron Depo., p. 10.) Plaintiff and TDI were still negotiating on July 8, 1992 (Exh. F, p. 10), and even on October 26, 1992 about the availability of the Spectacular (Exh. F, p. 15). Plaintiff's claim that he was relying on getting the Spectacular long before his

contract was signed is therefore incredible. (Lebron Depo., pp. 39-41.)

53. Plaintiff's work is not a time-sensitive political statement as long as Coors continues the practices which plaintiff seeks to bring to the public's attention. (January 4, 1993 Hearing, p. 27.) Plaintiff began working on this project in 1987. (Lebron Depo., p. 115.) At plaintiff's request and over defendants' objections, the trial on this matter was delayed from January 14, 1993 until January 27, 1993.

54. TDI signed the contract on November 30, 1992. Although plaintiff knew that the time for the display was approaching, he did not have the copy ready and delayed two more days in forwarding it to TDI. (Lebron Depo., pp. 62-63.) Although it takes up to three months to complete transparencies for the Spectacular, plaintiff left himself less than one month to prepare the transparencies, despite the busy Christmas season. (Notaro Depo., p. 14; Exh. F, p. 19.)

55. On December 4, 1992, Chris Culver of TDI told plaintiff that he thought that it would take a very long time for the proposed display to be approved by Amtrak and offered to make 500 other billboards elsewhere in New York City available to display the work. (Lebron Depo., pp. 102-103.)

56. Plaintiff never asked how large the billboards were that Mr. Culver offered to him to determine if they might be appropriate for his work (Lebron Depo., p. 137), nor did he ever inquire as to the price of any of those 500 billboards. (Lebron Depo., p. 139.) In fact, TDI leases billboards as large or larger than the Spectacular on the Major Deegan Expressway, the Brooklyn Expressway, on Broadway and Houston streets, and in the World Trade Center. (Schwartz Depo., pp. 49-51.)

57. As of December 4, 1992, and even at this time, plaintiff's work is not complete. Yet he is unwilling to try to make adjustments to the work so that it might fit on any of the 500 billboards that Mr. Culver offered to him. (Lebron Depo., pp. 131, 139-140.)

58. Plaintiff did not give any thought to what he would do with the work if the contract for the Spectacular was not executed. (Lebron Depo., p. 180.) For example, plaintiff received from TDI in 1990 or 1991 a package of materials containing maps of locations in the New York City metropolitan area where he might be able to display his work. Plaintiff filed this away and then lost it. (Lebron Depo., pp. 34-35.)

59. Plaintiff claims that his "reputation as an artist is largely created on the seriousness and consistency with which [he tries] and engage[s] broad audiences outside of a conventional gallery or museum environment on issues of public concern," yet he has accomplished this on only three occasions in the last 11 years. (Lebron Depo., p. 135.) His three past public displays in the New York City Transit System and the Washington D.C. Metro system only have reached the size of approximately four feet by five feet. (Lebron Depo., pp. 136-137.)

60. Plaintiff claims that he is irreparably damaged by not being able to represent his thoughts and feelings, through his artwork, in the venues of his choice. (Lebron Depo., pp. 202-203.) Yet, he is unwilling even to consider whether any of the 500 other venues offered to him by TDI might be appropriate for his work. (Lebron Depo., pp. 139-140.)

61. Plaintiff's assumption that TDI would have entered into a contract even if it had known about the anti-Coors advertisement was based on his belief that he had a "constitutional right" to the space. (Lebron Depo., pp. 183-184.) This belies plaintiff's claim that his reliance was based on any contract he had with TDI.

62. Plaintiff reluctantly conceded that one of the reasons he avoided showing the advertisement to TDI until it was nearly final, on December 2, 1992, was because he was afraid that TDI would not sign the contract in light of the work's anti-Coors nature. (Lebron Depo., p. 190.)

63. The first time plaintiff incurred out-of-pocket expenses for his display was January 1991. (Lebron Depo., p. 143.)

Plaintiff has not incurred any out-of-pocket expenses on the project since November 30, 1992, the day TDI signed the contract. (Lebron Depo., p. 144; Exh. F, pp. 21-65.)

* * *

(At the conclusion of trial on January 27, 1993, Judge Pierre N. Leval directed each party to admit or deny the proposed findings of fact offered by the oppostion. Following his instructions, each party annotated the other side's submission. For the purpose of printing these documents, comments that the parties wrote in the margins are bracketed and follow the finding or the portion of finding to which they pertain. The parties' additions are underscored; the deletions are indicated by strike-outs.)

PLAINTIFF'S PRE-TRIAL PROPOSED FINDINGS OF FACT INCLUDING DEFENDANTS' JOINT ANNOTATED RESPONSE TO FINDINGS, ¶ 1-209

(Supplemental Exhibit)

PRELIMINARY STATEMENT

This lawsuit challenges the attempt by the National Railroad Passenger Corporation ("Amtrak") and its agent, Transportation Displays Incorporated ("TDI"), to bar plaintiff Michael Lebron from displaying a political advertisement in the Penn Station Spectacular ("the Spectacular"), an illuminated billboard. Mr. Lebron, assured by Amtrak's agent, TDI, that there was no bar to political advertisements in the Spectacular, created an advertisement for that space and contracted to display it there during January and February 1993. Approximately one month after Mr. Lebron submitted his advertisement to defendants for review, however, and only two and a half days before the advertisement was to be displayed, TDI informed Mr. Lebron that Amtrak had rejected the advertisement because it violated an Amtrak policy against political advertisements in the Spectacular.

Plaintiff alleges that defendants' actions violate both his constitutional and contractual rights. His constitutional claims rest on a finding that for purposes of regulating speakers'

access to Penn Station, Amtrak should be treated as a state actor because of its symbiotic relationship with several government entities at Penn Station.

Amtrak was created and is controlled by the federal government. It would cease to exist were it not for annual federal subsidies in the hundreds of thousands of dollars. Because of this dependency, the federal government has a direct financial interest in Amtrak's advertising policies and practices, because a dollar earned by Amtrak is a dollar saved by the federal government. Amtrak's board, whose entire membership is appointed by the federal government, expressly authorized the Amtrak-TDI advertising licensing relationship that led to Mr. Lebron's contract. And Penn Station, the site of this dispute, was acquired for Amtrak by the federal government, paid for by the federal government, and cannot be leased or sold without the board's approval. These facts alone would be enough to find Amtrak a state actor.

However, the location of this dispute at Penn Station also implicates an even wider web of governmental interrelationships. Amtrak has entered into a complex set of relationships with government-run railroads and subways at Penn Station, including leasing of property, sharing of employees and physical space, undertaking of joint operations and projects, the grant of easements, and other contractual arrangements. These interrelationships essentially mean that it is impossible to say at any location in Penn Station where government stops and Amtrak begins. Thus, Amtrak must be treated as a state actor for purposes of this case because of its relationships with state, local and federal governments at Penn station.

Amtrak's "policy" against political advertising is unconstitutional for several reasons. First, the alleged "policy," of which only Messrs. Anthony DeAngelo and Bruce Bourque were apparently aware, is unwritten, has never been communicated to anyone at TDI, and is unknown to other Amtrak employees responsible for reviewing advertising copy. Even if said to exist, it is impermissibly vague, and therefore fails to provide prospective speakers with notice and leaves

Amtrak officials to apply their own subjective judgments. Any such policy, moreover, is flatly inconsistent with the written terms of Amtrak's contractual agreements with TDI, and has never before been enforced to bar any other political advertisement. A government entity would never be permitted to regulate speech on the basis of such a nebulous "policy," and therefore the policy, if there be one, must be invalidated.

Second, Amtrak's purported "policy" against political speech is an impermissible content-based restriction on speakers' access to a public space. Penn Station is a large, multi-purpose space that Amtrak has opened up for political communication. It allows people to distribute political literature, engage in political discussion, and display political placards. Other than with respect to the Spectacular, Amtrak exercises no prior review of advertising, and its contract with TDI expressly allows for political advertisements. Amtrak is currently displaying a political advertisement immediately in front of the Spectacular. And Amtrak allows retail book and magazine stores in Penn Station to sell and advertise political literature. Amtrak witnesses were not able to recall a single passenger complaint arising from these examples of political speech. In light of these practices, Penn Station is a designated public forum, and Amtrak's "policy" against political advertisements is unconstitutional. Moreover, even if Penn Station were a non-public forum, the restriction imposed is not reasonable in light of the purposes of the forum, for Amtrak has not demonstrated how a political advertisement would disrupt Penn Station's functioning.

Third, Amtrak's "policy" impermissibly gives preference to commercial over political speech, and impermissibly distinguishes between political advertisements in the Spectacular and elsewhere at Penn Station. The First Amendment forbids favoring commercial over political speech, and the First and Fifth Amendments require that any content distinctions on speech in different spaces must be justified by a compelling state interest.

Plaintiff's contract claims are predicated on the fact that TDI acts as Amtrak's agent in arranging contracts for the Spectacular. This is so notwithstanding TDI's claim that it is an independent contractor, because Amtrak retains approval over all material terms of the Spectacular contracts, including rates, duration, and advertising copy. Therefore, Amtrak is responsible for TDI's actions in negotiating and implementing the contract, and Mr. Lebron's contract is in effect with Amtrak. TDI is also liable on the contract because it failed to indicate to Mr. Lebron that it was acting as an agent for Amtrak.

Defendants' actions violate Mr. Lebron's rights under the contract in three ways.

First, Amtrak and TDI breached the contract with Mr. Lebron by exercising the right of ad copy approval unreasonably and in bad faith, particularly in light of TDI's prior representations that political advertisements were not a problem, Amtrak's own failure to enforce any policy against political speech anywhere else in Penn Station, and the delay in informing Mr. Lebron of its decision to reject the advertisement.

Second, Amtrak waived its right of approval in this case by failing to exercise that right in a timely fashion. Amtrak exercises a right of *prior* approval over advertising copy in the Spectacular, but in this case it waited virtually until the advertisement was to be put up before telling Mr. Lebron what it could have told him more than a year earlier, when its agent was informed that Mr. Lebron's advertisement would be political.

Third, Amtrak is equitably estopped from rejecting the contract for its political content because the TDI employee responsible for negotiating the contract, William Schwartz, misrepresented to Mr. Lebron that there was no bar against political advertisements, and Mr. Lebron then relied upon that representation to his detriment in creating his advertisement. Because TDI acts as Amtrak's agent in contracting for the Spectacular, Mr. Schwartz should have known of Amtrak's policy.

The Findings of Fact are organized as follows. Section I identifies the parties and physical space in dispute and details Mr. Lebron's contacts with TDI and the approval process for his advertisement. Section II sets forth the facts concerning Amtrak's and TDI's advertising standards and practices, with respect both to the Spectacular and to other advertising. Section III concerns Amtrak's related speech policies and practices at Penn station.

Sections IV through VII address facts relevant to state action. Section IV explains the creation of Amtrak and its control by the federal government. Section V concerns the United States' responsibility for Amtrak's acquisition of Penn Station and its continuing control over that property. Section VI sets forth the fiscal interrelationship between Amtrak and the United States. Section VII details the web of interrelations between Amtrak and other governmental entities at Penn station.

PROPOSED FINDINGS OF FACTS

I. *The Parties and Physical Space in Dispute*

The Parties

1. Plaintiff Michael Lebron ("Mr. Lebron") is a citizen of the State of New York and a resident of New York City. Lebron Dep. 6:3-5. [Admit]

2. Defendant Amtrak, a District of Columbia corporation with its principal place of busine[illegible] at 60 Massachusetts Avenue, N.E., Washington, D.C. 20002, was created by the Rail Passenger Service Act of 1970, as amended, 45 U.S.C. § 501 *et seq*. Amtrak Answer ¶ THIRD. **[Admit]**

3. Either in person or through its agents, Amtrak is transacting and has transacted business within New York including this district; regularly does and solicits business within New York including this district; and derives revenue from the operation of its railroad system, including New York's Pennsylvania Station ("Penn Station" or the "Station"),

through the Northeast Corridor (45 U.S.C. § 851(c)), including this state and district. Amtrak Answer ¶ FOURTH. **[Admit]**

4. Defendant TDI is a Delaware corporation that maintains its principal place of business at 275 Madison Avenue, New York, New York 10016. TDI ~~leases~~ sells advertising display space in many transportation stations and on billboards, ~~on behalf of their~~ pursuant to grants and licenses from owners, including Amtrak ~~and the Long Island Railroad~~ at Penn Station. TDI Answer ¶ 5; Schwartz Dep. 7:15-24, 11:25-12:22; Haut Dep. 30:24-31:6, 82:23-83:18.; Notaro Dep. 7:5-9:2, 83:4-95:23; PXX[1] 29; 53. **[OK]**

5. TDI has been known now or formerly as TDI, Winston Network and AMNI America. Haut Dep. 6:15-7:9. [Admit]

6. TDI is transacting and has transacted business within New York including this district; regularly does and solicits business within New York including this district; and, ~~as agent for Amtrak,~~ derives revenue in this state and district by contracting ~~as Amtrak's agent~~ to place advertising for the Spectacular. TDI Answer ¶ 6. Schwartz Dep. 10:14-18, 12:4-7, 16:16-20, 29:2-25, 37:20-38:11; PXX 2; 36. **[OK]**

Pennsylvania Station And The Penn Station Spectacular

7. Penn Station, a major hub of mass transportation in New York City, serves as a station on Amtrak's Northeast Corridor between Washington and Boston, and a terminus for both New Jersey Transit's and the Long Island Railroad's trains. DeAngelo Dep. at 16:6-9. The New York subway system abuts the station. DeAngelo Dep. 12:22-13:15. Amtrak owns Penn Station. DeAngelo Dep. 10:17-19. **[Admit]**

8. The Long Island Railroad ("LIRR") is owned and operated by the Metropolitan Transportation Authority ("MTA"). N.Y. Transp. Law § 219-c (McKinney 1975 & Supp. 1993). The MTA, New Jersey Transit ("NJT"), and the New York

[1] Plaintiff's exhibit(s) are referred to as "PX(X);" defendants' exhibit(s) as "DX(X)".

Transit Authority, which operates the New York subways, are ~~state entities~~ public authorities. N.Y. Pub. Auth. Law § 1263 (McKinney 1982 & Supp. 1993); N.J. Stat. Ann. § 27:25-4 (West 1992). **[OK]**

9. Penn Station occupies the area below street level in Manhattan that is bounded on the east and west by Seventh and Eighth Avenues and on the north and south by Thirty-fourth and Thirty-first Streets. It does not include the buildings above street level such as Madison Square Garden and Two Pennsylvania Plaza. DeAngelo Dep. 11:3-11; PXX 11 at Exhibit B, B-2 and 12; 62 at 5, ¶ 16. **[Admit]**

10. Penn Station comprises three levels. Amtrak owns all three levels, and leases space to the LIRR and NJT. The tracks, some of which are used jointly by Amtrak, the LIRR, and NJT, are all located on the lowest level. Through a leasing arrangement with Amtrak, the LIRR operates ~~most~~ a large portion of the middle or "A" level where its ticket windows are located and from which its trains are boarded, ~~although Amtrak retains responsibility for corridor and certain office space on the "A" level.~~ Amtrak ~~operates~~ controls the top or "B" level; ticket booths for both Amtrak and NJT are located on this level as well as an Amtrak ~~and MTA~~ information booth, and passengers for both Amtrak and the NJT board from the "B" level. DeAngelo Dep. 15:21-16:12, 184:3-187:3; Gallagher Dep. 32:8-33:24; PXX 1; 13; 14; 54. **[OK]**

11. Penn Station is a large, ~~multi-purpose~~ transportation facility. Its upper level ~~combines~~ contains the railroad station for Amtrak's ~~and NJT's~~ passengers ~~with the~~ including fast food restaurants and shops ~~that line~~ on the Seventh Avenue corridor ~~to give the feeling of an underground shopping mall~~ for the traveling public. The inventory of the station's ~~many~~ shops includes a bookstore, newsstands, ~~a jewelry store,~~ bakeries, novelty and souvenir shops, and drugstores, and Chemical Bank, ~~, an optician, clothing stores, a cutlery shop (Hoffritz), and a liquor store.~~ DeAngelo Dep. 298:7-9; PXX 84-85. **[OK]**

12. When approaching the Amtrak and NJT ticketing area from the east and before arriving at the information booth and main waiting area, one encounters a large, oval, high-ceilinged area known as the rotunda. Bourque Dep. 15:11-16:21; Schwartz Dep. 58:3-25; PXX 14 (marked by letter R); 54. Also located in the rotunda are escalators and a stairway which lead to the Station's main street level taxi stand. The rotunda may also be entered from the street through the corridor leading from Seventh Avenue. PXX 13, 54. The rotunda is a circulation area, and no seating is located in the rotunda. Gallagher Dep. 35:23-36:10; PX 54. **[OK]**

13. The Spectacular is a large, curved, back-lit advertising display space located approximately 20 feet above the floor of the rotunda, under which travelers walk as they enter and leave the main area of the Station. Schwartz Dep. 49:3-5; PXX 13; 50a; 50b; 50c; 54. The Spectacular measures approximately 103 feet long by 10 feet high. Its size and shape make it one of the largest advertising display spaces in New York City. Schwartz Dep. 49:6-19; Notaro Dep. 10:21-11:2; DX F at 9. **[Admit]**

14. The Spectacular is ~~normally~~ primarily seen ~~only~~ by those passing through the Rotunda. Lebron Dep. 84:18-85:6. It is not visible to passengers sitting in the Station's waiting area, standing at the Amtrak information booth, or waiting at the Amtrak ticket windows. Gallagher Dep. 32:11-33:2, 36:11-37:3; PXX 13; 54. **[OK]**

15. At least two advertising islands, or kiosks, measuring three feet on each side and seven feet high, are also located in the rotunda, on each side of the rotunda. Schwartz Dep. 41:3-19; Notaro Dep. 91:17-92:11; PXX 13; 54. **[OK]**

16. ~~The rectangular area in which the Amtrak ticket windows are located also has a very high ceiling. All four~~ Certain walls ~~of this space,~~ in the main waiting room, at a level above the normal ceiling level, include advertising ~~dioramas~~ spaces. Schwartz Dep. 36:17-21, 114:21-115:18; Notaro Dep. 86:11-25, 89:2-6; PXX 29; 53; 54. **[OK]**

Michael Lebron And His Work

17. Michael Lebron is an artist. His work, which combines visual and verbal elements, concentrates on political and social issues. Because a goal of his artistic work is to engage the public in these issues, he seeks to display his work in public places such as subways and transportation centers where he can reach a wide audience. Lebron Dep. 83:23-84:11; Lebron Aff. ¶ 2.

18. Mr. Lebron has exhibited his work in subways: in 1982, he exhibited posters concerning the arms race in the New York subway system; in 1984, his poster captioned "Tired of the Jellybean Republic?" was exhibited in the Washington, D.C. subway system ("Washington Metro"); and in 1987, the Washington Metro was the forum for a series of 25 works comprising drawings by different Nicaraguan children combined with photographs of the children and text describing the impact on them of the war in that country. Lebron Dep. 24:8-25:5, 65:13-20; Lebron Aff. ¶¶ 3-4; PX 44.

19. Mr. Lebron's 1984 work in the Washington Metro was the subject of a lawsuit, *Lebron* v. *Washington Area Metropolitan Area Transit Authority*, 749 F.2d 893 (D.C. Cir. 1984), which held (then-Judge Bork writing for then-Judges Scalia and Starr) that the Washington Metropolitan Transit Authority's refusal to display the "Tired of the Jellybean Republic?" poster because of its content violated the First Amendment.

20. TDI, under a prior name, TDI-Winston Network, Inc., was a defendant in *Lebron* v. *Washington Area Metropolitan Area Transit Authority*, 749 F.2d 893, 895 n.3 (D.C. Cir. 1984). Haut Dep. 6:15-7:9.

21. Mr. Lebron's work has also been exhibited in galleries in this country and abroad, primarily in "alternative" or university galleries that are more likely to exhibit work focusing on social and political themes. Lebron Dep. 113:2-15; Lebron Aff. ¶ 5; PXX 63a; 63b.

"IS IT THE RIGHT'S BEER NOW?"

22. The art installation/advertisement at issue in this case is a montage of photographs and text that uses verbal and visual parody of a typical Coors Beer billboard advertisement to criticize the Coors family's use of the profits of the Adolph Coors Company, including the Coors Brewing Company, to support right-wing political groups, such as the Nicaraguan contrast. DXX F at 67-69; G.

23. The caption, "IS IT THE RIGHT'S BEER NOW?," parodies the Coors Beer advertising slogan, "IT'S THE RIGHT BEER NOW," and a visual device—a can of Coors beer with a comet tail shooting out behind it suggesting a projectile—parodies the Coors "silver bullet." DXX F at 66-69; G.

24. Text along the lower left edge of Mr. Lebron's work states: "This art installation is an advertisement paid for by Michael Lebron and produced by the ATW Communications Group." DX F at 67-69.

25. The genesis of Mr. Lebron's Penn Station work dates to spring 1987, when he spent three weeks in Nicaragua and witnessed a war, which the United States was then supporting with aid to the contrast. After this visit, Mr. Lebron saw Joseph Coors, Vice Chairman and Director of the Adolph Coors Company, testifying on May 21, 1987 before Congress in support of continued funding for the contrast and admitting that he had financed the purchase of an aircraft for the contrast. Through further investigation, Mr. Lebron learned that the Coors family, through the Coors Foundation, spends millions of dollars annually to support right-wing groups such as The National Forum Foundation, Morality in Media, The Heritage Foundation, and the Free Congress Foundation. Lebron Aff. ¶¶ 7, 9.

26. The realization of this connection inspired Mr. Lebron to create a public art installation that would bring to the attention of the public the connection between the profits earned from the sale of Coors beer and support of the war in

Nicaragua as well as other causes associated with conservative organizations. Lebron Aff. ¶ 7.

27. In order to finance his work, Mr. Lebron began saving the $100,000 it would take to complete the project from his income as a freelance advertising art director. Lebron Dep. 93:5-7; Lebron Aff. ¶ 7.

28. In July 1991, Mr. Lebron hired a professional photographer to help create the photographs for the piece, and in September 1991 they flew to Nicaragua to hire a theater company to stage the Nicaraguan street scene and to scout for a location. In October 1991, they returned to Nicaragua to shoot the imagery that comprises the right half of the piece. The remainder of the photography was completed in Los Angeles and Baltimore. Then, in New York beginning in June 1992, Mr. Lebron worked with a computer operator, who had scanned all the photographs into a computer, to assemble the images electronically into the final visual image. In total, over 100 people worked on the project. Lebron Dep. 170:10-176:24; Lebron Aff. ¶ 7.

29. Mr. Lebron's total expenses for the creation of the work through November 1992 were $42,812. Lebron Dep. 143:2-144:22; DX F at 20-65; PX 64.

Michael Lebron's Contacts With TDI

30. In August 1991, Mr. Lebron first spoke by telephone to an account executive at TDI, William Schwartz, who provided information about various spaces available in Grand Central Station, Penn Station, and the World Trade Center. Lebron Dep. 37:4-20; Schwartz Dep. 65:23-68:19.

31. In his initial August 1991 conversation, Mr. Lebron told Mr. Schwartz that he was not with an advertising agency, that he was an artist who installs his work on billboards in public locations, and that he was interested in buying space in New York. Lebron Dep. 36:17-37:3; Schwartz Dep. 69:4-18. Mr. Lebron said that he had done business with TDI in Washington, gave Mr. Schwartz the name of the TDI repre-

sentative on that matter, disclosed that his work was political and that his works tend to be controversial, and mentioned that the work he had done with TDI in Washington had been the subject of a lawsuit. Lebron Dep. 37:4-38:7; 56:15-58:6; 63:21-65:6.

32. During the August 1991 conversation, Mr. Schwartz told Mr. Lebron that there were no policy restrictions on advertising that differed from the ones that operate in Washington and that the usual rules regarding taste and obscenity applied, and Mr. Lebron made a contemporaneous note of that information. Lebron Dep. 157:11-20, 195:9-196:13; Schwartz Dep. 71:19-22; DX F at 1 ("usual restrictions on content"). Mr. Lebron discussed with Mr. Schwartz the possibility of leasing the Spectacular, and Mr. Schwartz did not tell Mr. Lebron that there was a policy against political advertising in the Spectacular or anywhere else in Penn Station. Lebron Dep. 196:14-197:4; Schwartz Dep. 70:12-71:18. Although he does not know when, Mr. Schwartz told Mr. Lebron that all advertising was subject to TDI's approval. Schwartz Dep. 73:19-75:19.

33. Also during the August 1991 telephone call, Mr. Schwartz told Mr. Lebron that rental of the Spectacular was approximately $16,000 monthly and that it had to be rented for a year.[2] Lebron Dep. 39:10-17; Schwartz Dep. 72:3-5. During that conversation and subsequent ones in approximately January and May 1992, Mr. Lebron explored the possibility of renting the Spectacular for a period of less than one year, possibly in conjunction with other people, and Mr. Schwartz prepared a draft contract for such an arrangement. Lebron Dep. 39:18-41:13, 44:22-46:23, 47:20-48:25; Schwartz Dep. 76:10-77:23; DX F at 5-6.

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[2] It was during the 1991 trip to Nicaragua in late September or October, when Mr. Lebron began designing the work, that he decided that the size and shape of the Spectacular were particularly well suited to the display of the work as he envisioned it. Accordingly, the work was created specifically for the Spectacular. The unique dimensions of the site are such that the work is not suitable for display at any other location. Lebron Dep. 43:8-44:18; Lebron Aff. ¶ 9.

34. In May 1992, Mr. Lebron inquired of Mr. Schwartz about leasing the Spectacular by himself for two months. Lebron Dep. 46:11-47:2; Schwartz Dep. 79:19-80:10. After telephone calls, letters and an initial draft contract in July 1992, Messrs. Lebron and Schwartz negotiated terms for Mr. Lebron to rent the Spectacular by himself for January and February 1993 for $18,500 per month. Mr. Schwartz sent Mr. Lebron a contract dated July 31, 1992, reflecting that arrangement. Lebron Dep. 47:3-20, 49:2-51:12; Schwartz Dep. 82:4-15, 86:20-87:11, 87:24-88:5; DXX F at 10-12, 14; H.

35. Mr. Lebron signed the contract on August 19, 1992, and returned it to Mr. Schwartz. Shortly after that, Mr. Schwartz clarified that a final decision on the contract must await a decision by the advertiser then leasing the Spectacular, Abraham & Straus ("A&S"), about whether it intended to renew its lease. Lebron Dep. 51:10-22, 52:2-7, 53:9-17; Schwartz Dep. 82:6-15, 85:9-23; DX F at 13.

36. In August 1992, in response to an inquiry from Mr. Schwartz about the content of the work, Mr. Lebron reiterated that his work is political; that it looks like advertising and at first glance without reading it, people often think it is advertising; but, in a reference to the performance artist Karen Finley, he said that he was not the kind of artist who would stand naked in Penn Station pouring chocolate over himself in order to make a statement about sexual harassment. Mr. Schwartz did not then tell Mr. Lebron that there was a policy against political advertising in the Penn Station Spectacular. Lebron Dep. 53:20-21, 54:13-18, 55:4-18; 197:15-24; Schwartz Dep. 101:20-102:8. Lebron aff ¶ 11

37. Mr. Lebron told Mr. Schwartz that his advertisement was political, but sought to keep confidential the specific content of the work he was creating. Lebron Dep. 197:7-14. He did so as a matter of course with everyone he worked with for several reasons: to ensure that no one would misinterpret an unfinished work; to avoid disclosure of the specific content of the work until it was ready to be displayed; and to minimize association of his artistic work with the clients of the adver-

tising agencies that employ him. Lebron Dep. 53:20-54:18, 95:15-25, 96:23-97:8.

38. In response to an October 26, 1992 letter from Mr. Lebron, Mr. Schwartz informed Mr. Lebron in the first week of November 1992 that it was likely that even if A&S renewed, TDI would probably rent the Spectacular to Mr. Lebron before the A&S renewal period; Mr. Schwartz promised to confirm that information in a week. Lebron Dep. 60:2-61:5, 166:20-167:4; DX F at 16.

39. A week came and went without confirmation from TDI. During Thanksgiving week, Mr. Lebron visited Mr. Schwartz at TDI's offices to inquire about the status of his work. During his twenty-minute visit, he showed samples of his work, all of which were political, to Mr. Schwartz. When Mr. Schwartz asked which of the works Mr. Lebron intended to display in the Spectacular, Mr. Lebron explained that he was designing an original work. When the two parted, Mr. Schwartz said that his supervisor would be back in the office with the contract after Thanksgiving. Lebron Dep. 6:24-10:15, 9:5-8, 11:11-12:10, 15:12-25, 16:13-23; 22:25-23:21, 26:2-27:18, 29:25-30:18, 61:6-18; Schwartz Dep. 98:15-99:11; DXX A-E.

40. Mr. Schwartz remembers that, during Mr. Lebron's visit to his office, Mr. Lebron said that he was an artist and that his work made people think. Moreover, Mr. Schwartz understood that Mr. Lebron's work was not commercial, and he remembers seeing one of the works that Mr. Lebron said he showed him during the visit. Schwartz Dep. 99:15-100:20, 101:11-102:3; Lebron Dep. 10:12-11:4, 12:6-10.

41. At no time during Mr. Lebron's 1992 Thanksgiving visit, even after seeing samples of Mr. Lebron's work, did Mr. Schwartz tell Mr. Lebron that there was a policy against political advertising in the Penn Station Spectacular. Lebron Dep. 197:25-198:21; Schwartz Dep. 102:4-8.

42. On November 30, 1992, Mr. Schwartz called Mr. Lebron to tell him that TDI had signed his contract, which

Mr. Lebron picked up the next day at TDI's offices. Lebron Dep. 62:2-12, 63:13-17, 167:25-169:2; Schwartz Dep. 91:12-22; DX F at 17, 18.

43. The contract between TDI and Mr. Lebron is the form contract that TDI uses for all advertising intended to be displayed in railroad stations. Haut Dep. 28:18-24; *see, e.g.*, DX H.

44. The contract between TDI and Mr. Lebron was signed by Chris Culver for TDI. Nowhere does the contract state that TDI is signing as the agent for Amtrak, nor does it state that the contract is subject to final approval by Amtrak. The contract states only that "[a]ll advertising copy is subject to approval of TDI and the Transportation Facility concerned as to character, text, illustration, design and operation." Notaro Dep. 72:6-74:10; DX 52; DX H at III.a.

45. On December 2, 1992, Mr. Lebron provided TDI with a color photocopy of the visual portion of the work and, separately, a copy of the text for review. Lebron Dep. 62:13-63:20; Schwartz Dep. 95:21-25.

46. On December 3, 1992, Mr. Schwartz told Mr. Lebron that when he first looked at the work, it seemed like an ordinary commercial advertisement for a product, but, when he read it, he realized it was "very heavy." In response to Mr. Lebron's question whether there was likely to be a significant problem with approval of the work, Mr. Schwartz said he did not know because it was not his job. Lebron Dep. 93:8-95:3; Schwartz Dep. 110:21-112:8.

47. At no time during the December 3 conversation did Mr. Schwartz tell Mr. Lebron that there was a policy against political advertising in Penn Station. Lebron Dep. 63:21-65:6; 198:22-199:9.

48. On December 4, 1992, Chris Culver, TDI's then-New York Sales Manager, told Mr. Lebron that the Amtrak approval process would take a long time, and he offered Mr. Lebron a large number of alternative billboard locations on

which to display the work Mr. Lebron had submitted on December 2, 1992 for approval. Lebron Dep. 199:10-200:15.

The Approval Process for Mr. Lebron's Work

49. Although Mr. Lebron delivered his work to TDI for review on December 2, TDI's general counsel, Tina Haut, did not send it to Amtrak until December 7, 1992. The photocopy of the work was addressed to Bruce Bourque, the Project Director for Real Estate Development, Penn Station, New York, who makes the initial determination about whether to approve material submitted for the Spectacular. Haut Dep. 60:14-19, 67:11-68:9; Bourque Dep. 107:13-108:14; DeAngelo Dep. 41:11-47:24; PX 5.

50. Mr. Lebron's work was received at Amtrak on December 8 and Mr. Bourque first saw it on December 9. Although Mr. Bourque thought that the work was political and therefore not qualified to be displayed in the Spectacular, he did not inform Ms. Haut or Mr. Lebron that the work violated an Amtrak policy against political advertising. Bourque Dep. 108:14-24, 115:23-25, 120:7-14, 122:16-123:17; Haut Dep. 20:23-21:7.

51. Mr. Bourque took no action regarding Mr. Lebron's work until December 14 or 15, when he showed it to Maria Green in Amtrak's Legal Department. Bourque Dep. 108:15-18, 110:4-10, 112:11-25, 117:3-11. He took that step because he had received from Ms. Haut letters from Mr. Lebron's counsel. *Id.* On December 14 or 15, Mr. Bourque still thought Mr. Lebron's work was political (Bourque Dep. 120:15-20), but he failed to notify TDI or Mr. Lebron, even though Ms. Haut telephoned him a number of times pressing for a prompt response regarding approval. Bourque Dep. 110:11-111:9; Haut Dep. 72:16-74:6. (Ms. Haut had received several communications from Mr. Lebron's counsel asking for a decision before Mr. Lebron would be required to spend the $20,000 required to make the transparency TDI requires for the Spectacular before the January 1, 1993 beginning of his contract date. Haut Dep. 63:18-66:11; PXX 24; 25.)

52. Mr. Lebron's application was discussed during a dinner meeting Mr. Bourque had with Anthony DeAngelo, Ms. Green, and Don Pross, Mr. Bourque's supervisor, on December 17, 1992, in New York. Mr. DeAngelo, Amtrak's Vice President for Real Estate and Operations Development, makes all final decisions approving an advertisement for the Spectacular. DeAngelo Dep. 41:11-42:17, 47:19-24, 120:4-121:1; Bourque Dep. 7:16-18; 118:14-120:4.

53. Although Mr. Bourque believes that he showed the pictorial copy to Mr. DeAngelo, Mr. DeAngelo does not believe he saw it before he made his decision; he thinks that Mr. Bourque described it to him, mentioning the right-wing organizations Mr. Lebron identifies in his work. Bourque Dep. 119:19-120:4, 121:18-122:4; DeAngelo Dep. 111:17-112:6, 112:19-25, 113:8-20, 114:20-115:20.

54. On December 17, 1992, Mr. DeAngelo disapproved Mr. Lebron's work for the Spectacular because it was political. DeAngelo Dep. 112:10-18, 114:14-19, 121:20-122; *see also* Bourque Dep. 121:18-122:15.

55. Ms. Green of Amtrak's Legal Department drafted Amtrak's letter to TDI stating the basis for Amtrak's disapproval. Although Mr. DeAngelo now says the reason for rejecting Mr. Lebron's advertisement was that it was not "commercial," Mr. Bourque recalls that Mr. DeAngelo rejected the ad because it was political, and Mr. Green's letter to TDI stated that Amtrak would not accept Mr. Lebron's advertising because "Amtrak's policy is that it will not allow political advertising on the spectacular advertising sign." PX 6. Because Mr. DeAngelo was on vacation, Mr. Turpin signed the letter on behalf of Mr. DeAngelo. Amtrak mailed that December 23, 1993 letter to TDI, where it was not received until January 4, 1993. A copy of it was faxed to TDI on December 28 or 29, 1992. Bourque Dep. 122:6-8; 125:4-135:10; DeAngelo Dep. 114:14-17; 121:3-10; Haut Dep. 68:12-69:17; PX 6.

56. Although the decision to disapprove Mr. Lebron's advertisement was made on December 17, no one from

Amtrak notified TDI until December 23, 1992, when Ms. Haut was notified by telephone. Despite undertaking on December 22 "to get an answer from AMTRAK as soon as possible," Ms. Haut decided not to notify Mr. Lebron or his counsel of Amtrak's decision until she had received a letter from Amtrak. Bourque Dep. 125:4-135:10; Haut Dep. 70:11-19, 72:8-15; PX 26.

57. On December 28 and 29, 1992, Mr. Lebron's counsel made final efforts to secure from TDI a response about the status of Mr. Lebron's work before the beginning of the January 1 contract period. Haut Dep. 66:5-67:10; PXX 27, 28.

58. It was not until December 29, 1992, after Amtrak's general counsel was informed of Mr. Lebron's intent to sue, that TDI notified Mr. Lebron's counsel of Amtrak's decision. Haut Dep. 66:14-19; Phares Aff. ¶ 14; PX 28.

II. *Amtrak Advertising Standards and Practices*

59. Amtrak's Board of Directors ~~has direct authority to~~ could approve or disapprove Amtrak's advertising policies. ~~and has delegated this authority to its Finance Committee, which has delegated it to its Vice President for Real Estate and Operations Development.~~ DeAngelo Dep. 24:15-25:8, 38:10-21. ~~As a result,~~ Amtrak's Real Estate Department ~~(and specifically the Real Estate Development and Marketing section),~~ is responsible for third-party advertising located on Amtrak property. Delaney Dep. 14:9-15:13. **[OK]**

60. In February 1991, Amtrak's Board of Directors ~~specifically~~ authorized Amtrak to enter into licensing arrangements with TDI to sell Amtrak advertising space in Amtrak's stations and on Amtrak's outdoor advertising locations. The Board authorized the Vice President for Real Estate and Operations Development to sign all necessary documents to further all such arrangements. Delaney Dep. 81:10-24; DeAngelo Dep. 24:15-25:8; PXX 2; 65 at 7-8, 127. **[Admit]**

61. Pursuant to this authorization, Amtrak has entered into ~~three~~ two different licensing arrangements with TDI: one covering all station advertising, ~~other than the Spectacular;~~ including the Spectacular (except its price terms) and one covering all outdoor advertising~~;~~. ~~and a third covering the Spectacular itself.~~ On March 15, 1991, Amtrak and TDI signed two ~~general~~ contracts governing the ~~first~~ two licensing arrangements. PXX 2, 27. ~~However, neither of these contracts governs then Spectacular; they neither refer to (or describe) the Spectacular nor include the terms by which the Spectacular is leased.~~ Delaney Dep. 59:7-60:21; Haut Dep. 12:21-13:17; DeAngelo Dep. 82:23-83:11 PXX 2; 127.[3] **[OK]**

62. The ~~leasing~~ arrangement concerning the Spectacular is ~~instead~~ governed by the 1991 in door agreement (PX 2), past practice and a series of letter agreements. Under this ~~agreement, also authorized by the Board, all terms including~~ arrangement, the monthly rate, duration, and advertising content, ~~even~~ and cancellation—of any contract that TDI arranges for the Spectacular must be approved by Amtrak. ~~TDI~~ Amtrak receives a percentage of the net receipts, an arrangement that was established by past agreements and separate letter agreements between Amtrak and TDI and their predecessors. DeAngelo Dep. 223:20-224:16, 239:3-13, 240:12-242:6, 243:10-19; Haut Dep. 13:12-17; Notaro Dep. 67:21-68:20, 70:12-71:5, 72:6-73:5; PXX 20; 34-37; 46, 52. **[OK]**

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[3] ~~From the outset of this litigation, defendants' counsel have consistently misrepresented to plaintiff's counsel that the March 1991 Station Advertising agreement (PX 2) covers the Spectacular. They did so at several depositions, and in a January 14, 1993 letter from Richard Slattery to Gloria Phares. PX 62 at 4, ¶ 8. However, witnesses for both TDI and Amtrak have stated that the March 1991 Station Advertising Agreement does not cover the Spectacular. In fact, the Spectacular is not included in the description of advertising spaces covered by the Agreement, which include only "posters, islands, TDI clocks, and dioramas." PX 2 at 1. Moreover, the financial terms of the Agreement do not include those for the Spectacular. The Agreement establishes two fixed percentages that TDI is to pay Amtrak out of its net receipts on the different displays covered by the Agreement, but these amounts do not reflect the 65% agreement that applies only to the Spectacular. *Id.* at 2; DeAngelo Dep. 227:9-14; 235:3-13; 237:12-238:21.~~

63. For example, all the contracts for the A&S advertisements that have been in the Spectacular since 1987 state on their face that the contract and copy are subject to final approval by Amtrak. In 1987, the Amtrak Board of Directors ~~specifically approved~~ authorized the first of the A&S contracts for the Spectacular. ~~The Amtrak document that recommended approving the contracts and the Board Minutes approving the contracts refer to them as contracts between Amtrak and A&S Department Stores, Inc.~~ DeAngelo Dep. 242:13-247:22; PXX 37; 52; 58-60; 106-109. **[OK]**

Amtrak's Advertising Standards

64. According to Anthony DeAngelo, Amtrak Vice President for Real Estate and Operations Development, Amtrak applies the same advertising content standards to the Spectacular as it does to all other advertising, including in-station advertising (wall posters, dioramas, free-standing "islands" or kiosks) and billboards along Amtrak's right of way ("non-Spectacular advertising"). DeAngelo Dep. 32:6-33:18, 50:24-51:3; 70:9-71:6; Delaney Dep. 39:8-40:6; Bourque Dep. 60:21-61:3. **[Admit]**

65. Mr. DeAngelo~~, who~~ has ultimate approval authority for advertisements~~,~~. ~~stated that Amtrak's policy prohibits advertisements for (i) competitors (such as airlines and buses), (ii) pornographic advertisements, and (iii) advertisements that are "objectionable to our riding public and others associated with us including political and other types of potentially controversial matters." DeAngelo Dep. 8:3-10, 30:13-18.~~ The policy is also intended inpart, to avoid having Amtrak's passengers "view advertisements on the Spectacular that they may deem offensive or divisive." DeAngelo Aff. § 4. **[see pp. 30-33, 42, 94 of DeAngelo Depo]**

66. ~~With the exception of the prohibition on competitor's advertising, however, there is no written version of this policy or its justifications. DeAngelo Dep. 30:22-31:20, 59:20-60:6, 92:2-21; *see* PX 2, ¶ 7(c) (barring competitors' ads).~~ **[No; See PX 4, PX 18]**

67. ~~There is no written policy whatsoever regarding advertising standards for the Spectacular. DeAngelo Dep. 30:22-31:20.~~ **[PX 4, PX 18]**

68. ~~"Objectionable" is not defined or illustrated in writing in any document governing TDI's leasing of Amtrak's advertising space.~~ DeAngelo Dep. 44:9-47:24, 59:20-60:6. Mr. DeAngelo defined "objectionable" as follows:

> Issues that would cause our passengers to be concerned and upset to write letters to us, to talk about it amongst themselves and things which they would find inappropriate for Amtrak to be a part of.

DeAngelo Dep. 61:5-12. **[PX4, PX 18; OK]**

69. William P. Delaney, a project manager in Amtrak's Real Estate Department who was Amtrak's principal negotiator with respect to the 1991 Agreement (Delaney Dep. 6:7-9, 21:7-22:18), ~~and who reviews copy for both in-station and outdoor advertising~~ (Delaney Dep. 37:7-38:10), had never ~~even *heard*~~ learned of ~~an~~ Amtrak policy against political or any other advertising (other than to prohibit competitive advertising)[4] (Delaney Dep. 16:15-17:16, 31:3-7, 39:15-23, 49:18-50:~~4~~ 53:14-16).[5] **[OK]**

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[4] ~~Amtrak apparently does not even enforce its written policies consistently. The 1991 contracts with TDI prohibit the display of advertisements of Amtrak's competitors, and Amtrak has ordered airline advertisements removed in the past. However, TDI's billings reflect that it has placed advertisements in Penn Station for airlines, such as American and Continental. DeAngelo Dep. 71:22-72:11; Delaney Dep. 43:11-45:8; PXX 2, ¶ 7(e); 29 at 40, 43, 46-47, 55, 62-63, 68, 71, 77-78; 53; 127.~~

[5] ~~Plaintiff's evidence on this score is based solely upon Mr. Delaney's deposition testimony. At the commencement of this case, plaintiff's counsel submitted an affidavit from an associate at Weil, Gotshal & Manges, reflecting the substance of a conversation he had with Mr. Delaney on this subject. A question has been raised by opposing counsel as to whether the associate should have initiated that call, and conducted it in the manner he did. While not conceding any ethical impropriety, Weil, Gotshal & Manges does not condone his conduct, and no reliance has been placed upon the information gleaned during that conversation. In any event, the substance of that call has been amply confirmed by Mr. Delaney in his subsequent deposition testimony.~~

70. ~~Mr. Delaney testified that, to him, while "objectionable" means "incendiary," "not in good taste," and "inflammatory," (Delaney Dep. 25:25-26:25, 38:18-39:6), he is not aware of any Amtrak policy that would prohibit any such advertisements (Delaney Dep. 31:3-34:14). Moreover, he has never discussed these standards with anyone at either Amtrak or TDI, and the only criteria he uses in applying these standards are his own "internal criteria." Delaney Dep. 6:5-20, 29:17-30:5, 36:5-23, 86:4-25. Finally, he stated that he was not aware of any Amtrak written materials relating to any criteria for assessing advertising. Delaney Dep. 39:15-23.~~ **[Irrelevant—See Amtrak Finding of Fact para. 28]**

71. ~~While~~ tTwo Amtrak officials contend that a 1980 contract between Amtrak and TDI is ~~the source~~ evidence of its policy against political advertising (DeAngelo Dep. 31:2-20; Bourque Dep. 61:2-20, 65:21-66:7).~~;~~ [6] tThat contract was cancelled and superseded by a 1985 contract between Amtrak and WNI (TDI's-predecessor), which ~~deleted~~ did not contain any specific reference to political advertising (PX 3, ¶ 7). The 1985 agreement was, in turn, superseded and cancelled by the 1991 Agreement, which also contained no specific reference to political advertising. PX 2, ¶¶ 30-31. **[OK]**

72. ~~Moreover, despite Amtrak's claim that the superseded 1980 contract is the source of its policy against political advertising,~~ Bruce Bourque, a project director in Amtrak's Real Estate Development Department ~~who~~ is responsible for reviewing proposals for Spectacular advertisements~~;~~. [OK] ~~has not looked at the 1980 contract since shortly after starting with Amtrak in 1984 (*i.e.*, before the 1980 contract was~~

[6] The 1980 contract (PX 4, ¶ 27) precluded

> any advertising that, in [Amtrak's] judgment, may be unlawful, immoral, improper or offensive to good taste, or be in competition directly or indirectly with the transportation conducted by [Amtrak] or its affiliated companies; or involve political or other views which could result in dissension or involve [Amtrak] in dissension, complaints or controversy with its patrons or the public . . .

~~superseded), and Mr. Delaney, the principal negotiator of the 1991 agreements, had never even *seen* the 1980 contract prior to his deposition.~~ Bourque Dep. 62:5-25; Delaney Dep. 68:23-69:4, 71:22-23, 92:18-93:4. **[Irrelevant See Amtrak Finding para. 28]**

73. Furthermore, Mr. DeAngelo has not informed members of his staff—who have general responsibilities for particular stations, including observing the advertising in those stations—of Amtrak's advertising standards or of any policy against political advertising. Rather, the staff is simply expected to use its "common sense" in evaluating whether the advertisements are "contributing to the overall effectiveness" of the station. DeAngelo Dep. 41:1-42:17, 45:12-46:4, 74:7-75:12. **[No]**

74. ~~Apart from~~ Prior to the present case, Amtrak has never ~~rejected or ordered any~~ been asked to display a political advertisement ~~removed either~~ and no such advertisement has been displayed on the Spectacular or anywhere else.~~—because of its "political" content.~~ DeAngelo Dep. 53:19-55:7, 72:2-15; Delaney Dep. 32:11-34:25, 47:9-48:10; Bourque Dep. 72:19-23. ~~Nor could~~ Mr. DeAngelo could not recall ever receiving an Objection from the public regarding an advertisement. DeAngelo Dep. 79:18-80:7. **[OK]**

75. ~~Amtrak's deponents were unable to provide a coherent, consistent definition of "political" advertising. Mr. DeAngelo initially defined "political" only as "mostly non-commercial" (DeAngelo Dep. 33:19-20), but stated that advertisements that do not sell products are only "potentially political" (DeAngelo Dep. 35:4-17). He could not say whether an advertisement such as a Benetton advertisement depicting an oil-laden duck that promotes a product or service while also communicating another message would be considered political (DeAngelo Dep. 34:4-23). He subsequently stated that any non-commercial advertisement would be against Amtrak policy, but acknowledged that this statement was inconsistent with Amtrak's written contracts with TDI, which allow for the display of both public service announcements and advertising~~

~~by non-profit organizations. DeAngelo Dep. 286:4-291:19; PX 2, ¶ 32~~. **[*No*; See Deposition and objections therein.; No]**

76. ~~To Mr. Delaney, "political" advertising meant campaign advertising. He could not say whether any other advertising geared toward public issues would be political, stating that he would have to see an example in order to make a judgment. Delaney Dep. 50:15-51:17~~. **[*No*; Irrelevant; also Amtrak Finding para. 28]**

77. Mr. Bourque ~~admitted~~ stated that ~~he did not know what political advertising is and that~~ he had not previously been presented with a political advertisement since joining Amtrak in 1984. Bourque Dep. 71:3-4, 72:21-23, 73:16-22, 6:19-21. ~~Mr. Bourque also had not thought about whether all advertisements that are not selling a product or service are political.~~ Bourque Dep. 102:14-18.

78. ~~Mr. Bourque maintained that a Timberland advertisement containing a reference to Native Americans was "political" even though it was also intended to sell a product (footwear) (Bourque Dep. 99:7-100:11; PX 41); that Smartfood advertisements for popcorn poking fun at politicians and royalty had "a large political component" and "probably would be considered political" (Bourque Dep. 96:22-97:24; PX 40); that a Benetton advertisement showing leaves soaked with oil was political (Bourque Dep. 90:9-12; PX 39); and that advertisements for *Time* magazine featuring photographs of currents events with related rhetorical questions—e.g., "What Happens To You If He Goes?" were political because even though they sold a product, they had a "political message."~~ Bourque Dep. 94:1-95:3; PX 39. **[*Irrelevant*; See Deposition Obj.; Bourques Depo pp. 162-193]**

79. ~~Mr. DeAngelo explained that Amtrak's rationale for not displaying a non-commercial advertisement, such as a political advertisement, even if the advertiser were willing to pay Amtrak's rates for the Spectacular, relates to a concern for a loss of revenue. Specifically, Mr. DeAngelo disapproved Mr.~~

~~Lebron's work in order to avoid the loss of passengers who might be so antagonized by the work that they would refuse to ride the railroad.~~ DeAngelo Dep. 294:3-295:14, 295:22-297:20, 314:7-316:11; DeAngelo Decl. ¶ 4. **[See DeAngelo Depos]**

Spectacular Advertising

80. ~~Although not set forth in any written agreement between TDI and Amtrak,~~ ~~t~~The practice of the parties has been to require prior approval of the content of Penn Station advertising by Amtrak only for the Spectacular. DeAngelo Dep. 57:18-58:8, 42:21-23, 70:20-71:6; Haut Dep. 16:22-17:4. **[OK]**

81. In the case of Spectacular advertisements, the copy and the artwork are forwarded from TDI—usually by Vincent Notaro or Richard Ament—to Mr. Bourque. He reviews it and presents it to Mr. DeAngelo along with his comments, which are usually verbal rather than written. Bourque Dep. 53:2-17; Haut Dep. 22:2-12, 60:2-6; Notaro Dep. 19:3-20:16; PXX 46; 48; 49; 51. **[Admit]**

82. TDI is~~, or should be,~~ aware of the fact that, over the years, Amtrak ~~has had a history of delay~~ normally takes atleast 30 days in deciding whether to approve proposed advertisements for the Spectacular. Notaro Dep. 26:6-34:22, 35:22-45:7, 50:21-51:4, 56:6-60:21, 64:10-67:5; PXX 34; 38; 46; 48; 51. **[OK]**

83. Mr. DeAngelo has final authority to approve advertisements for the Spectacular. DeAngelo Dep. 37:17-21. He communicates his decision—not always in written form—to a member of his staff, who then communicates it to TDI. DeAngelo Dep. 49:17-20. Amtrak does not always maintains no written records of this process. Delaney Dep. 42:24-44:8. **[OK]**

Non-Spectacular Advertising

84. ~~Although Mr. DeAngelo states that Amtrak's policy concerning advertising content is applied consistently to all advertising on Amtrak property,~~ Amtrak ~~in fact~~ does not exercise prior content review for any advertising other than the Spectacular. DeAngelo Dep. 48:11-23, 72:19-23, 73:9-14, 51:4-7; Haut Dep. 23:20-24:2. **[OK]**

85. Tina Haut, General Counsel of TDI, testified that, at least since she arrived in 1985, TDI had not submitted *any* non-Spectacular advertisements to Amtrak for review. Haut Dep. 24:23-25:5, 25:22-26:3. **[OK]**

86. Non-Spectacular advertising is ~~at best~~ seen ~~reviewed~~ by Amtrak only after it is in place~~,~~. ~~and often only if someone were to complain about it.~~ DeAngelo Dep. 51:8-52:7. ~~However, a~~No Amtrak employee could recall ~~a single~~ an instance in which Amtrak has received a complaint from the public concerning any advertisement, nor any instance in which Amtrak decided to remove an advertisement because it was objectionable (apart from the airline ads identified by Amtrak staff as inconsistent with the policy against competitors' ads). DeAngelo Dep. 71:22-72:15; Delaney Dep. 55:20-56:24. **[OK]**

87. ~~Mr. Bourque did not know what standards are applied to non-Spectacular advertisements (Bourque Dep. 68:8-12, 74:18-20), and, as stated above, Mr. Delaney used his own internal criteria to assess advertising.~~ Delaney Dep. 36:5-23.

88. ~~Mr. DeAngelo claims that TDI guidelines, which he concedes are inconsistent with and less restrictive than Amtrak's, do not control or have any effect on advertising at Penn Station. DeAngelo Dep. 287:12-291:19, 318:6-18; PX 15, ¶ 13. But as Amtrak does not review any non-Spectacular advertisements prior to their display, the TDI advertising standards are the *de facto* standards applicable to such advertisements. TDI's standards are "[b]asically community standards." Haut Dep. 25:10. TDI's "Commercial Advertising Guidelines" (dated January 1990) provide that "[a]ll advertising placed by TDI should reflect a high level of good taste, decency and community standards in both copy and art." PX 15, ¶ 1. They explicitly permit political and other ideological advertising. PX 15, ¶ 13.~~ **[Irrelevant + See DeAngelo Depo Object.; No Foundation]**

TDI's Advertising Standards and Relationship to Amtrak

89. ~~Prior to the discussions concerning Mr. Lebron's advertisement, Ms. Haut had never discussed the standards for approval of advertising with anyone at Amtrak and was not aware of any Amtrak advertising policy or prohibition on political advertising. Haut Dep. 19:3-15. Even with respect to Mr. Lebron's advertisement, Ms. Haut was not told anything about Amtrak's approval process other than that it would take time. She was never told, even though she telephoned Mr. Bourque several times regarding the status of the application, that Amtrak had any policy that would preclude the advertisement. Haut Dep. 20:13-21-7.~~ **[See Depo pp. 19-21 for Testim.]**

90. ~~Mr. DeAngelo was unaware that TDI had its own advertising standards. DeAngelo Dep. 317:19-318:5. He thinks he recalls having discussions with someone from TDI "in the distant past," and they "may well have discussed a ban on political advertising" but he testified that he might not have had such a discussion.~~ DeAngelo Dep. 88:15-89:25. **[See *Depo.; No;* Also *Irrelevant*]**

91. Vincent Notaro, Senior Vice President for Franchise Development at TDI who is responsible for the fabrication and installation of Spectacular displays and who for many years has forwarded proposed copy to Amtrak, testified that he has never discussed advertising standards with Mr. Bourque. Notaro Dep. 6:21-7:14, 9:9-10:7, 11:3-11:12, 53:17-24. [OK]

92. Far from prohibiting political advertisements, TDI's commercial advertising guidelines accept such advertisements as commercial advertisements, and charge full commercial rates for them. Haut Dep. 46:17-21; PX 15, ¶ 13 (full rate

card charged for any advertisement "promoting or criticizing a political candidate or party, or any statement that tries to influence, provoke, preach, theorize, criticize, condemn or condone any government policy, political philosophy, specific religion, or ideology . . . ."). **[*Irrelev*; See DeAngelo Dep 287-291, 318]**

93. Mr. Lebron's advertisement was acceptable under the TDI guidelines as reflected by the offer from TDI's Mr. Culver to display Mr. Lebron's advertising in other TDI locations. *See supra* ¶ 48. **[Irrelev.]**

Advertising Practices

94. The 1991 Station Advertising Agreement permits TDI to display "public service advertising" and advertising by non-profit organizations in Amtrak stations, including Penn Station. PX 2, ¶ 32.

95. TDI defines public service advertising as "non-commercial, non-partisan" advertisements not designed to influence elections or legislation. PX 16, ¶ 1. "Non-commercial" is defined as an advertisement that does not, as its primary purpose, promote a product for sale or a service for hire. PX 16, ¶ 2.

96. While Mr. DeAngelo was not aware of any public service advertisements being displayed, TDI in fact does place such advertising in Amtrak stations. DeAngelo Dep. 96:10-12; Haut Dep. 43:23-44:17; PX 2, § 32(c).

97. Public service advertisements displayed in Penn Station by TDI in the past included messages concerning the homeless, the environment, drunk driving (for the group Mothers Against Drunk Driving), AIDS, and race relations, none of which Amtrak ordered removed. Haut Dep. 37:10-19; 44:5-7.

98. Amtrak and TDI have also permitted and continue to permit the display of paid political advertisements in Penn Station. For example, advertisements for *The Plain Truth*, a religious magazine on political and social issues published by

The Worldwide Church of God, have been displayed immediately in front of the Spectacular since at least 1988. PXX 29 at 43, 52, 59, 68, 77; 53. These advertisements do not sell a product or service. The current advertisement describes the magazine as discussing "world trends" and "social issues," and pictures a magazine cover with the headlines "A United Europe: The Next Superpower?," and "Say No to Adultery." PXX 21a; 21b; 21c. Amtrak and TDI also have permitted advertisements for news magazines such as *Time*, *The Economist*, and *Newsweek*, which discuss political issues, and political satire magazines like *Spy*. Finally, Amtrak and TDI have permitted advertisements for airlines such as American and Continental, even though barred by ¶ 7(c) of the 1991 Agreement. Notaro Dep. 93:10-97:2; PXX 29; 53; 55a; 55b; 55c.

III. *Related Policies and Practices Respecting Political Expression in Penn Station*

99. Amtrak treats Penn Station as a public forum, permitting political speech not only by advertisers, but also by retail store owners and the general public. For example, Amtrak has written guidelines, entitled "Amtrak Regulations For Exercise Of Certain Free Speech Rights In Pennsylvania Station, NYC," which permit, on a content-neutral basis, distribution of literature, display of placards and engaging of passersby in conversation about political, religious and other issues. PX 10.

100. Pursuant to these guidelines, Amtrak has permitted a variety of individuals and organizations, such as The Alliance Committee for the Homeless (PX 33/10), United Homeless Organization (PX 33/23), Our House at St. Peter's (PX 33/25), and Animal Protection/SUPPRESS (PX 33/17) to provide literature, engage in discussions and solicit funds within Penn Station. PXX 10, ¶ 15; 31; 32.

101. The only time Amtrak has ever refused an applicant's request for a permit to exercise free speech rights in Penn Station has been: i) when the applicant has sought to exercise

such rights initially during a time of peak travel through Penn Station (*i.e.*, Thanksgiving) (Gallagher Dep. 146:22-149:14; PX 33/34); or ii) when the applicant has in reality sought to sell products rather <u>than</u> engage in more traditional forms of free speech expression (Gallagher Dep. 154:12-156:13; PX 33/32).

102. The advertising and free speech policies merge at certain points, for example in the case of The Worldwide Church of God, a fundamentalist Christian organization. That organization advertises on a kiosk at Penn Station (*see* PXX 21a; 21b; 21c), and distributes its monthly religious magazine, *The Plain Truth*, free of charge through its advertising displays (PXX 21a; 21b; 21c; 22). *The Plain Truth* contains articles discussing such topics as religion, social issues including homosexuality and gambling, and political issues such as the Arab-Israeli conflict from a Christian perspective, in addition to providing information about the Worldwide Church of God. PXX 22; 80.

103. Amtrak leases space to numerous retail establishments in Penn Station, including book stores and newsstands which sell books and magazines on political issues. PXX 84-85.

104. Mr. DeAngelo is not aware of any restrictions in Amtrak's retail leases that prevent the proprietors from selling books and magazines with political messages; nor does anyone from Amtrak review the content of the books and magazines that are sold in Penn Station from stores leased from Amtrak; nor is Mr. DeAngelo aware that anyone has ever complained about the political content of books or magazines sold by Penn Station retailers. DeAngelo Dep. 299:11-300:17.

IV. *The Creation and Control of Amtrak by the Federal Government*

The Creation of Amtrak

105. Congress created Amtrak in 1970, after determining that rail passenger service was deteriorating. Rail Passenger Service Act, 45 U.S.C. §501 *et seq.* ("RPSA"). **[Admit]**

106. In creating Amtrak, Congress directed that it:

> shall be operated and managed as a for profit corporation, the purpose of which shall be to provide intercity and commuter rail service, employing innovative operating and marketing concepts so as to fully develop the potential of modern rail service in meeting the Nation's intercity and commuter passenger transportation requirements.

45 U.S.C. § 541. **[Admit]**

107. Congress specifically encouraged Amtrak <u>inter alia</u> to engage in joint projects with state, regional and local governments, establishing as one of its goals:

> [e]ncouragement of State, regional, and local governments and the private sector to share the costs of operating rail passenger service, *including the costs of operating stations* and other facilities, *in order to minimize Federal subsidies.*

45 U.S.C. § 501a(2) (emphasis added). **[Admit]**

108. Under RPSA, the Secretary of Transportation, "acting in cooperation with other interested federal agencies and departments," designated the basic system of intercity passenger rail service to be provided by Amtrak. 45 U.S.C. § 521. The system, as so established, was not reviewable in any court. 45 U.S.C. § 522.**[Admit]**

109. More specifically, under RPSA, existing railroads could enter into contracts with Amtrak pursuant to which Amtrak, for a ~~fee~~ <u>payment</u>, would take over their services and relieve them of their responsibilities. 45 U.S.C. §§ 561(a)(1), (a)(2).**[Admit]**

110. All but three existing railroads chose to contract with Amtrak. PX 85. **[Admit]**

111. As a result, Amtrak, which was launched with a $40 million direct federal grant and $300 million in federal loan guarantees, assumed nearly all basic system intercity passenger service obligations. PX 110 at A1. **[Admit]**

Amtrak's Corporate Structure and Goals Are Mandated by the Federal Government

112. ~~Although~~ Congress created Amtrak as a "for profit" corporation and stated that it is not an agency of the federal government, 45 U.S.C. § 541~~,~~. ~~Congress ensured that it controlled all of the details of Amtrak's corporate governance, e.g.:~~

- ~~incorporation; 45 U.S.C. § 542~~
- ~~qualifications and appointment of directors and officers; 45 U.S.C. § 543(a)~~
- ~~bylaws; 45 U.S.C. § 543(b)~~
- ~~stock conversion and voting rights; 45 U.S.C. § 543(c)~~
- ~~appointment, tenure, and duties of the president and other officers; 45 U.S.C. § 543(d)~~
- ~~general provisions respecting common and preferred stock; 45 U.S.C. § 544~~ **[See Statute]**

113. ~~In addition, Congress ensured that Amtrak's Board of Directors would be one hundred percent controlled by the United States.~~ The Act provides that Amtrak will have a nine-member Board of Directors. The President of the United States appoints five members (three of whom are selected from lists of nominees drawn up by involved parties) and the Secretary of Transportation sits *ex officio*. 45 U.S.C. § 543. Two additional board members are selected by Amtrak's preferred stockholder—the federal government. *Id.*; PX 61 at 24. The president of Amtrak, who is selected by the rest of the directors, fills the final Board position. 45 U.S.C. § 543. **[OK]**

114. Amtrak's Board of Directors is responsible for providing direction to Amtrak and ~~has~~ would have the authority to approve or disapprove of Amtrak's advertising policies. DeAngelo Dep. 24:15-25:8; PX 72. **[OK]**

115. ~~The Board apparently has delegated its authority to approve or disapprove Amtrak's advertising policies to its Finance Committee, which delegated it to Anthony DeAngelo, the Vice President for Real Estate and Operations Development.~~ DeAngelo Dep. 24:15-25:8, 38:10-21, 55:11-24. The Board ~~has the authority to~~ could review and reverse Mr. DeAngelo's decisions regarding Amtrak's advertising standards. DeAngelo Dep. 37:17-38:9, 60:7-61:4. **[OK]**

116. Additionally, the Board, by resolution, has ~~specifically~~ authorized ~~Amtrak's~~ two current Amtrak agreements with ~~its advertising agent,~~ TDI. Delaney Dep. 81:10-24, DeAngelo Dep. 183:6-18; PX 65 at 7-8. Under those agreements, TDI can ~~lease~~ sell to third parties advertising space in Amtrak's train stations and on billboards along its right-of-ways. PXX 2, ¶ 1, 27; 127, ¶ 1. **[OK]**

117. Amtrak has issued both preferred and common stock. PX 61 at 24. The common stock is owned by ~~the~~ railroads and their successors which were relieved by Amtrak of their obligations to provide intercity rail service. 45 U.S.C. § 561. The common shares are not traded~~,~~. ~~and there is no evidence that they have any market value.~~ PX 86. **[OK]**

118. The Secretary of Transportation holds all of Amtrak's preferred stock for the benefit of the federal government. PX 61 at 23.[7] **[Admit]**

119. As Amtrak's preferred stockholder, the federal government is entitled to (1) cumulative dividends fixed at a rate of not less than six percent per annum (all of which must be paid before the holders of common stock can receive any payments) and (2) a liquidation preference over common shares involving a payment of not less than par value plus all accrued dividends. PX 61 at 24. **[Admit]**

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[7] The Act requires Amtrak to issue to the Secretary of Transportation preferred stock equal in par value to all federal operating payments and most federal capital payments received subsequent to October 1, 1981, as well as capital and certain operating payments received prior to that date. 45 U.S.C. § 544; PX 61 at 23. **[Admit]**

120. To date, Amtrak has paid no dividends on any stock. PX 61 at 26. **[Admit]**

Amtrak Has Rights, Privileges and Obligations Typically Conferred Only upon Governmental Entities

121. ~~While Congress has stated that Amtrak is not a federal government agency, it has substantial rights and privileges, and obligations otherwise conferred or imposed only on government agencies. *See infra* ¶¶ 122-37.~~

Rights and Privileges

122. The Secretary of Transportation, with the approval of the Secretary of the Treasury, can guarantee any obligation of Amtrak (including securities, loans, obligations and contracts) issued to finance the upgrading of capital equipment and facilities necessary for the improvement of Amtrak's passenger service, and all such guarantees "constitute general obligations of the United States of America backed by the full faith and credit of the Government of the United States of America." 45 U.S.C. § 602. **[See Statute]**

123. ~~Unlike any typical private entity,~~ Amtrak has been granted the right to exercise the power of eminent domain. 45 U.S.C. § 545(d); DeAngelo Dep. 150:18-152:4. **[OK]**

124. Amtrak is statutorily exempt from the applicability and operation of (1) regulations of the ICC and (2) state and local laws with respect to routes, service rates, fares and charges. 45 U.S.C. § 546(a), (c).

125. Amtrak is statutorily exempt from the burden of paying taxes or other fees (including <u>virtually</u> all real estate taxes) imposed by any state, political subdivision or local taxing authority, including ~~the burden of~~ paying New York real estate taxes on Penn Station. 45 U.S.C. § 546(b); DeAngelo Dep. 136:3-19, 137:6-25; *see also* PXX 9; 68; 90-92. **[OK]**

126. Only the Attorney General, or an aggrieved employee, can bring suit against Amtrak for a violation of the Act. 45 U.S.C. § 547. **[Admit]**

127. Only the Attorney General can sue Amtrak to complain of its discontinuance or reduction of services. 45 U.S.C. § 547."[8] **[Admit]**

128. Amtrak has the power to exclude all rail competitors from the ~~territories in~~ <u>routes over</u> which it is providing intercity rail services. 45 U.S.C. § 561(c). **[Admit]**

129. <u>Under certain circumstances,</u> Amtrak can demand that another railroad provide Amtrak with access to its tracks and facilities. If Amtrak and the other railroad cannot agree on the compensation to be provided for Amtrak's use of such tracks and facilities, the ICC can require the other railroad to make its property immediately available to Amtrak, with compensation to be subsequently fixed. 45 U.S.C. § 562(b). **[OK]**

130. If Amtrak has been provided with access to a railroad's facilities, such railroad cannot downgrade its facilities without prior authorization from the Secretary of Transportation. 45 U.S.C. § 566. **[Admit]**

Obligations

131. Amtrak is considered a "mixed-ownership Government corporation," 31 U.S.C. § 9101~~,~~ ~~as are, for example, the Federal Deposit Insurance Corporation and the Resolution Trust Corporation.~~ 31 U.S.C § 9101(2). [OK]

132. ~~As a mixed-ownership Government corporation,~~ Amtrak's financial transactions ~~are~~ <u>may be</u> periodically audited by the Comptroller General, whose audit reports are provided to Congress, the President and the Secretary of the Treasury. 31 U.S.C. § 9106. **[OK]**

133. Amtrak must submit three reports annually to Congress: (i) a report on the intercity passenger service; (ii) a report on its operations, including the amount of federal funds it will need in the coming year to sustain its services;

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[8] ~~With regard to such actions, Amtrak has argued that it should be treated as a government entity and afforded the same protection against damages that the United States enjoys under the Federal Tort Claims Act. See PX 67 at 31.~~ **[No—See Document; Just Wants Tort Reform]**

and (iii) a report on how Amtrak is meeting the mandate of providing a balanced national transportation system. 45 U.S.C. § 548; *see generally* DeAngelo Dep. at 130:14-21. **[Admit]**

134. Amtrak, like ~~any sovereign authority,~~ other privately owned railroads, employs its own police force "to provide security and protection for rail passengers." 45 U.S.C. § 545(j). These police carry guns and have the right to make arrests on Amtrak property. DeAngelo Dep. 158:8-24, 159:24-161:13. ~~They also are involved with the administration of Amtrak's "free speech" program.~~ Gallagher Dep. 45:9-51:6. **[OK]**

135. Amtrak~~, like other government entities,~~ is subject to compliance with the requirements of the Freedom of Information Act. 45 U.S.C. § 546; 49 CFR § 7.01 *et seq.* **[OK]**

136. ~~Congress itself recently recognized that Amtrak should be treated like a government entity with respect to t~~The Americans with Disabilities Act, ~~a statute which prohibits discrimination against disabled persons by public entities. The Act expressly~~ includes Amtrak in its definition of "public entity." 42 U.S.C. § 12101 *et seq.*; *see also* Gallagher Dep. 9:14-11:5; PX 74.[9] **[OK]**

137. ~~Amtrak's operations must be conducted in accordance with numerous other federal statutes specifically addressed to Amtrak, including: (1) RPSA, (2) the 3R Act, (3) the 4R Act, and (4) the Northeast Rail Service Act, 45 U.S.C. § 1101 *et seq.*~~ **[See Statute]**

[9] The term "public entity" is defined as (1) any State or local government, (2) any department, agency, special purpose district, or other instrumentality of a State or States or local government, and (3) the National Railroad Passenger Corporation and any state, local or regional commuter authority (45 U.S.C. § 502(8). 42 U.S.C. § 12131(1).

VI. *Amtrak's Acquisition of Penn Station*

138. Although Amtrak took over most intercity rail service by 1971 (*see supra* at ¶ 110-11), it neither owned track nor directly operated trains at that time. PXX 66 at 5-6; 69 at 1.[10] **[Admit]**

139. Amtrak first acquired track and substantial other railroad property on April 1, 1976 when, ~~as a direct result of government actions authorized by and conducted in accordance with~~ pursuant to the Regional Rail Reorganization Act of 1973 (the "3R Act"), 45 U.S.C. § 701 *et seq.*, and the Railroad Revitalization and Regulatory Reform Act (the "4R Act"), 45 U.S.C. § 801 *et seq.*, Amtrak acquired ownership and control of the Northeast Corridor (and other rail properties) and "became, for the first time, a fully operating railroad . . . ." PX 66 at 6.[11] **[OK]**

140. Amtrak acquired Penn Station, now "the busiest station in Amtrak's system,"[12] as part of its ~~federally mandated~~ acquisition of the rail properties in the Northeast Corridor. ~~The federal government compelled t~~The station's former owner (the Penn Central Transportation Company) ~~to~~ transferred the station to Consolidated Rail Corporation ("Conrail"), which in turn was ~~compelled by the federal government to~~ transferred ~~it~~ it to Amtrak. ~~Because of the importance of federal government involvement in Penn Station to~~

[10] Rather, it relied on contract service with the private railroads. *See, e.g.*, Gen. Acting Office, *Amtrak's Incentive Contracts with the Railroads — Considerable Costs, Few Benefits* (June 8, 1977); Laurence E. Tobey, *Costs, Benefits, and the Future of Amtrak*, XV Transp. L.J. 246, 269 (1987) ("*Costs, Benefits*"). **[OK]**

[11] The United States Railway Association defined the Northeast Corridor to ~~include Penn Station and~~ include "such properties presently used in passenger operations in the [Penn Central] main line route between Boston and Washington, D.C. via New London and Hell Gate Bridge, including all main line tracks, structures, power and control systems, stations, platforms, passenger yards and shops." PXX 68 at 42; 66 at 5.

[12] PXX 77 at 10-11; 88 at 20.

~~the state action issues in this case, the complete story of Amtrak's acquisition of Penn Station is set forth below.~~ *See infra* at ¶¶ *141-58*.

Congress' Statutory Plan

141. In 1973, Congress enacted the 3R Act to combat the public danger to essential rail services in the northeast and midwest caused by the widespread bankruptcies of railroads in those regions. *See, e.g.*, 45 U.S.C. § 701(a). **[Admit]**

142. ~~Under the 3R Act, bankrupt railroads located in the northeast and midwest could be compelled by the federal government to transfer ownership of their properties to others if such transfers would further the government's plan to reorganize the railroads into "an economically viable system capable of providing adequate and efficient rail service." 45 U.S.C. §§ 701(b)(2).~~ **[See Statute]**

143. ~~Under the 3R Act, the newly established United States Railway Association ("USRA"), a nonprofit government corporation, was authorized to develop and adopt a Final System Plan (the "Plan") identifying: (1) those rail properties that would be transferred, (2) the amount and type of compensation that would be afforded to transferors, and (3) the parties to whom the properties would be transferred or offered (*i.e.*, to Conrail for Amtrak, to Conrail for state, local or regional authorities, or to other railroads). 45 U.S.C. §§ 716(e)(1)(A) (D), (f); 717; 791(d).~~ **[See Statute]**

144. ~~USRA could require the transfer of "any assets or rights owned, leased or otherwise controlled by a railroad . . . which are used or useful in rail transportation service." 45 U.S.C. § 702(12). Thus, USRA could order that railroad tracks and stations, and even office buildings be transferred. *Id.*; *see also Penn Central Corp. v. United States Railway Ass'n*, 475 F. Supp. 165 (Regional Rail Reorg. Ct. 1979).~~ **[See Statute]**

145. To carry out the purposes of the 3R Act, USRA was authorized to (1) issue obligations guaranteed by the

Secretary of Transportation and (2) make loans to Conrail, Amtrak and other railroads. 45 U.S.C. §§ 720, 721. **[Admit]**

The Final System Plan

146. The Plan that USRA ultimately developed, which Congress approved, called for the transfer of specified rail properties owned by several insolvent rail carriers, including Penn Central Corporation (formerly, The Penn Central Transportation Company) and numerous of its affiliated companies (collectively, "Penn Central"), to Conrail, Amtrak (via Conrail) and, in some instances, other railroads. *See generally* PX 68 at Ch. 8. **[Admit]**

147. As contemplated by the 3R Act, the Plan recommended that properties in the Northeast Corridor (other than segments of properties already owned and leased by state or local transportation authorities) be transferred by their owners to Conrail and then acquired by Amtrak from Conrail by sale or lease. 45 U.S.C. §§ 716(c)(1)(C), 791(d); PX 68 at 3, 14, 37-38. **[See Statute]**

148. Congress, which considered the Northeast Corridor critical to effective rail reorganization and the Amtrak project itself, intended that Amtrak use the properties in that region in connection with its development of a high-speed passenger service. 45 U.S.C. §§ 501(c)(3), 545(h), 716(a)(3); PX 68 at 14. **[Admit]**

149. USRA justified transferring the Northeast Corridor properties to Amtrak by noting that sale or lease of such properties to Amtrak would "allow[] an unencumbered assumption of authority and responsibility that will simplify and accelerate the improvement program *and afford maximum protection to the public investment*." PX 68 at 42 (emphasis added). **[See entire paragraph of p. 42]**

The Transfer

150. As mandated by the 3R Act, USRA submitted its Plan to the Special Court, Regional Rail Reorganization Act (the

"Special Court"), and the Special Court ordered the owners of the designated properties to convey their properties in the manner and to the parties designated in the Plan. *See* 45 U.S.C. § 743(b). **[See Statute]**

151. Pursuant to the Plan, on April 1, 1976, Penn Central conveyed ~~Penn Station and its other~~ designated properties, including Penn Station to Conrail which in turn transferred ~~Penn Station and~~ the ~~other~~ Northeast Corridor properties (including hundreds of miles of track and Penn Station) to Amtrak.[13] *See* PXX 11; 12. *See also* DeAngelo Dep. 154:11-15; PXX 66 at 5-6; 24; 69 at 4 & Schedule.

152. By statute, the transfers were exempt from federal, state or local taxes. 45 U.S.C. § 743(e). **[See Statute]**

The Billion Dollar Purchase Price

153. Penn Central was not compensated for the transfer of Penn Station and its other rail properties until five years later when, on November 16, 1980, after almost five years of litigation and two years of settlement negotiations, the federal government ultimately paid for the transfer pursuant to the terms of a settlement agreement entered into by the United States, USRA and Penn Central (the "Settlement Agreement"). *See* PX 70. **[OK]**

154. In the Settlement Agreement, the United States and USRA, *inter alia*, agreed to pay to Penn Central $2.113 billion (comprising a compromise value plus interest) to compensate it for the ~~loss~~ transfer of ~~Penn Station and its other~~ the Northeast Corridor properties~~.~~, including Penn Station. PX 70 at § 4.01 and Table 1. **[OK]**

155. The Special Court approved the Settlement Agreement on December 4, 1980. PX 70. **[OK]**

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[13] The properties conveyed to Amtrak, the majority of which were located in the Northeast Corridor, included 130 stations, maintenance facilities in 12 cities, additional passenger cars, locomotives and track maintenance equipment, and the ownership or operating rights to about 722 miles of railroad lines. PX 69 at 2 & Schedule.

156. At that time, the multi-billion dollar payment reportedly was the largest settlement payment made in United States history. PX 111. **[OK]**

157. The United States made the required $2.113 billion payment to Penn Central in cash on January 15, 1981. PX 112. **[OK]**

158. Amtrak still owns Penn Station today. DeAngelo Dep. 10:17-24. ~~However,~~ Amtrak can neither sell Penn Station nor enter into lease transactions relating to Penn Station involving "aggregate consideration in excess of $750 thousand" without the ~~express~~ approval of *its* Board of Directors. DeAngelo Dep. 25:18-26:19, 152:5-18; PX 71 at 9. The Board has delegated authority for less valuable leases to Mr. DeAngelo, ~~but retains control over the disposition and use of Amtrak's property.~~ *See* PX 71. **[OK]**

VI. *The Fiscal Interrelationship Between the Federal Government and Amtrak Is Extensive*

In Each Year of Its Existence, Amtrak Has Received Massive Federal Subsidies

159. Amtrak, by statute, is ~~entitled~~ permitted to receive direct financial subsidies from the federal government. 45 U.S.C. § 601. **[OK]**

160. ~~Indeed, as Amtrak itself admits, "Congress has never statutorily directed Amtrak to reach full operational self sufficiency." *See* PX 75 at 1. Instead, Congress "has encouraged [Amtrak to] operate in as cost effective manner as possible and make its decisions as if it were profit oriented." *Id.*~~ **[See entire paragraph of p. 1 of PX 75]**

161. Although Congress directed that Amtrak "shall be operated and managed as a for profit corporation" (45 U.S.C. § 541), it has never made a profit. DeAngelo Dep. 129:20-130:5, 130:22-132:16, 137:21-25. Each year that it has been in existence, Amtrak has received ~~substantial~~ federal subsidies—both for its operations and for capital acquisitions and improvements. *Id.*; PX 61 at 23. *See generally* PXX 67; 76; 87; 89; 93-94; 101-104. **[OK]**

162. Indeed, in 1976, Amtrak's fiscal year-end for accounting purposes was changed, pursuant to Public Law 94-25, from December 31 to September 30 "to coincide with the fiscal year adopted by the federal government and used in providing federal assistance to [Amtrak]." PX 66 at 6. **[OK]**

163. For 1993, Amtrak requested $331 million in operating subsidies and $572 million in capital improvements. PXX 76 at 1-2; 93 at 3-4. **[OK]**

164. In response to that request, Congress provided Amtrak with $700.1 million in federal funds (of which $331 million is for operating purposes) for 1993. *See* Pub. L. 102-388, 106 Stat. 1520, 1534 (October 6, 1992); PX 61 at 23. **[OK]**

165. Further, Congress also provided to the Secretary of Transportation $146 million to pay certain tax liabilities for 1993. Pub. L. 102-388, 106 Stat 1520, 1534 (Oct. 6, 1992). **[OK]**

166. During each of the past five years, Congress has appropriated hundreds of millions of dollars to subsidize Amtrak. The annual amounts are as follows:

1988—$630,300,000
1989—$630,000,000
1990—$656,000,000
1991—$684,000,000
1992—$712,000,000

45 U.S.C. § 601. **[OK]**

The Federal Government Has Invested Billions to Improve Amtrak's Properties and Services in the Northeast Corridor

167. Amtrak does approximately half of its business in the Northeast Corridor~~, and is (and has been) the largest single passenger carrier of any kind in that area.~~ PXX 61 at 17; 67 at 8; 77 at 7; 95 at 7; 96 at 7. **[OK]**

168. Amtrak values its properties in the Northeast Corridor at $3.422 billion. PX 61 at 18. **[OK]**

169. ~~The federal government paid for these properties (*see supra* at ¶¶ 153-58) and continues to have a substantial interest in them. In fact, t~~The federal government has held a mortgage ~~valued at "hundreds of millions of dollars"~~ on the Northeast Corridor properties since Amtrak acquired them in 1976. DeAngelo Dep. 153:7-23; PX 114 at IV-G-IV-J. **[OK]**

170. The Northeast Corridor Property Improvement Project, which was established pursuant to the 4R Act in 1976, authorized total appropriations of $2.5 billion for investment in the Northeast Corridor. 45 U.S.C. § 854; PX 87, Attachment 1 at 3. **[OK]**

171. Since then, the federal government has spent more than $2 billion to rehabilitate the Northeast Corridor roadbed and improve the region's services. PX 113. **[OK]**

172. For fiscal year 1993 alone, Amtrak requested $272 million in funds for the Northeast Corridor Improvement Project. **[OK]** ~~(including $8 million specifically earmarked for Penn Station tunnel and yard improvement).~~ *See* PXX 76 at 2, 23-24; 93 at 4. **[Not find in doc.]**

173. ~~The federal government invests in and subsidizes the Northeast Corridor in other ways as well. For example, Amtrak, through certain direct lessees of the federal government, subleases Union Station in Washington, D.C. from the federal government at a substantially below market rate. DeAngelo Dep. 10:4-16, 172:19-176:24.~~ **[See Depos.]**

174. Further, in 1988, the General Services Administration identified Amtrak as the primary preferred carrier for government business travel between ~~various~~ a few points on the Northeast Corridor. PX 67 at 8-9. **[OK]**

Amtrak Has Sought to Maximize Its Revenues Through Both Public and Private Sources

175. ~~Running an intercity passenger railroad like Amtrak is unprofitable.~~ DeAngelo Dep. 159:2-22.[14] At this time,

[14] In fact, it is so unprofitable that no other companies want to get into the business. *Id.*

Amtrak cannot ~~begin to~~ pay all of its operating costs or make all necessary capital improvements from its revenues and, ~~is~~ therefore ~~dependent upon~~ receives annual federal subsidies. DeAngelo Dep. 132:5-16. **[OK]**

176. ~~Because of Amtrak's dependence on federal subsidies, a dollar of revenue earned by Amtrak is a dollar saved by the United States. DeAngelo Dep. 132:5-16 (noting that increases in Amtrak's revenues are inversely proportionate to its federal subsidies); *cf.* PX 67 at 31 (Amtrak's president noting that "[b]ecause damage claims paid by Amtrak ultimately are borne by the Federal government, it is reasonable that [limitations in damages against the United States under the Federal Tort Claims Act] also be applied to Amtrak").~~

177. ~~According to Amtrak, Congress recognized this "revenue cross ratio" when it agreed with Amtrak that t~~The Federal Railroad Administration ~~(not Amtrak) should make~~ made statutorily required deposits in payment of Amtrak's Rail Retirement Tax Act liabilities, excess Railroad Unemployment Repayment Tax payments and excess Railroad Unemployment Insurance Act payments. DeAngelo Dep. 133:6-134:4; PXX 7 at 26; 61 at 24. Those payments have been in the millions of dollars. *See, e.g.*, PXX 7 at 26 ($145 million in 1991); 61 at 23-24 ($150 million in 1992). **[OK]**

178. In an attempt to meet its congressionally imposed goal of reducing its reliance on federal funding (*see* 45 U.S.C. § 501a(1)), Amtrak has sought to increase the revenues it receives from both public and private sources by, *inter alia*, entering into agreements such as the one with TDI that forms the backdrop of this case. *See generally* PXX 67; 87; 89; 93-94. **[OK]**

Amtrak's Advertising Revenues

179. ~~Recognizing the fiscal relationship between Amtrak and the federal government discussed above, Congress instructed Amtrak to use its "best business judgment in taking actions to minimize Federal subsidies" and, to that end, specifically encouraged Amtrak to maximize its revenues by~~

~~entering into profit-generating contracts with the private sector in order to reduce the level of federal subsidies. Indeed:~~

> Amtrak is encouraged to *enter into agreements* with the private sector and undertake initiatives which are consistent with good business judgment and *designed to* maximize its revenues and *minimize Federal subsidies*.

45 U.S.C. § 501a(14) (emphasis added) *see also* 45 U.S.C. § 501a(1). **[See statute; See Prior Sentence of statute]**

180. The federal government ~~closely monitors Amtrak's attempts to fulfill this congressional mandate, and~~ requires ~~regular~~ reporting by Amtrak. 45 U.S.C. § 548; 31 U.S.C. § 9106. **[OK]**

181. ~~As noted above,~~ Amtrak's profit-generating endeavors include the revenues derived from ~~leasing of~~ its station advertising space, including the Spectacular space in Penn Station, and ~~the leasing of~~ its outdoor billboard advertising space. *See* DeAngelo Dep. 98:15-20, 129:11-19, 148:9-150:12; PX 2, ¶ 3(c). **[OK]**

182. Amtrak earns a significant amount of advertising revenues each year—probably between $600,000 and $800,000—from these ~~leasing~~ agreements. DeAngelo Dep. 148:9-150:12. **[OK]**

183. Approximately $300-400,000 (or one-half of Amtrak's advertising revenues) come from the ~~leasing of~~ advertising space in railroad stations. DeAngelo Dep. 149:18-150:5. The balance is derived from the ~~leasing of~~ outdoor billboard space along its rights-of-way. *Id.* **[OK]**

184. At Penn Station, Amtrak generates advertising revenues ~~by leasing~~ from the advertising space in Penn Station that is within its control (*i.e.*, the advertising space in Penn Station not leased to LIRR). ~~Such leasing~~ The sale of such space is done ~~by Amtrak~~ exclusively ~~through~~ by TDI. DeAngelo Dep. 27:11-17, 27:24-28:19, 29:12-18; Bourque Dep. 50:18-23; PX 2, ¶ 1. **[OK]**

185. Pursuant to the parties' agreements, TDI ~~transfers~~ pay Amtrak a percentage of the revenues paid by advertisers~~,~~

~~minus its commission, to Amtrak.~~ PX 2, ¶ 6. *See also* DeAngelo Dep. 98:15-20; Notaro Dep. 46:20-25.

186. The money that Amtrak receives from ~~leasing~~ its advertising space, including the money that Amtrak receives from TDI for ~~the lease of~~ the Spectacular and other Penn Station advertising space, goes into its general accounts and becomes part of Amtrak's operating revenues~~,~~. ~~thereby reducing Amtrak's need for federal subsidies.~~ DeAngelo Dep. 129:11-130:5. **[OK]**

187. The United States continues to hold a mortgage valued at "hundreds of millions of dollars" on ~~Penn Station and~~ the Northeast Corridor properties, ~~that Amtrak acquired~~ including Penn Station. DeAngelo Dep. 153:7-23; PX 114 at IV-G-IV-J. **[OK]**

VII. *Amtrak Has Extensive Financial Interrelationships with Various State and Local Governmental Entities at Penn Station* **[All Irrelevant]**

188. ~~State governments and state agencies, like the federal government and federal agencies, have significant involvement in Amtrak's operations.~~ *See generally* PXX 7; 61; 66; 77; 88; 95-97. ~~In fact,~~ Amtrak has a corporate office entitled "Government and Public Affairs" which inter alia "work[s] with state and local governments, many of them . . . on a variety of Amtrak related issues which would go to legislation, it could go to financial support, it could go to operating requirements and regulations, et cetera, a whole range of issues like that." DeAngelo Dep. 194:9-195:23, 201:13-202:9. **[OK]**

189. ~~Further, Amtrak cooperates with, receives monetary and other assistance from, and provides monetary and other assistance to, a panoply of state governments and agencies.~~ *See generally* PXX 7; 61; 66; 67-79; 87-89; 93-97; 114-26.

190. Amtrak derives significant revenues from real estate ~~easements, leases and licenses~~ in the Northeast Corridor and hopes to increase those revenues in the future. PX 77 at 22. **[OK]**

191. ~~Amtrak's interrelationships with state and local government entities are particularly strong at Penn Station.~~

192. ~~For example, t~~Two ~~government entities~~ public authorities—New Jersey Transit and the LIRR—are tenants at Penn Station and~~, like Amtrak,~~ utilize Penn Station in the conduct and operation of their respective rail passenger services. DeAngelo Dep. 11:12-12:8; Gallagher Dep. 11:14-12:9; PXX 81; 105. **[OK]**

193. As noted above, Amtrak leased a portion of the A level of Penn Station to the LIRR for 99 years, for a total of $44.4 million. DeAngelo Dep. 11:12-23, 141:17-144:2; PXX 77 at 32; 81; 105. **[OK]**

194. ~~Amtrak has entered into "a whole series of leases, subleases and other arrangements" with New Jersey Transit. DeAngelo Dep. 11:24-12:8; PXX 74; 83. For example, for a fee, Amtrak allows New Jersey Transit to use space on Level B of Penn Station (the level on which the Spectacular is located (see supra ¶ 10)) for its ticket windows.~~ DeAngelo Dep. 185:4-187:7; *see also* PX 67 at 23.

195. ~~Although~~ Amtrak ~~"owns"~~ the space ~~provided~~ leased to New Jersey Transit (*see* PX 12)~~,~~. ~~the federal government determines the remuneration to be paid by New Jersey Transit for the space it leases from Amtrak.~~ DeAngelo Dep. 12:2-8.

196. ~~Amtrak's *physical* interrelationships with governmental transportation entities at Penn Station are especially extensive.~~ On the "A" level, both Amtrak and LIRR control space, and New York Transit authority subway lines abut the station at both ends. On the "B" level, Amtrak ~~shares space with~~ leases space to the New Jersey Transit~~, including~~ for ticket windows~~, a waiting area, and stairs to the trains~~. In addition, ~~Amtrak's~~ Amtrak at its information booth on the "B" level ~~is manned by Amtrak and~~ allows a New York City Transit authority ~~personnel.~~ employee to give information. ~~Moreover, a set of easements reflect the fact that passengers routinely pass through Penn Station to transfer from government transportation services to Amtrak and vice versa.~~

DeAngelo Dep. 16:19-17:12, 177:19-178:23, 179:5-12; Gallagher Dep. 16:24-20:6; 21:10-24-11; PXX 13-14; 54.

197. Further, Amtrak has entered into an agreement entitled "Northeast Corridor Service Agreement" with New Jersey Transit which, in 1993 alone, provides for a total estimated annual payment by New Jersey Transit to Amtrak of $21.13 million (of which $3 million is earmarked for "joint benefit" projects). PX 78 at 1; 79. **[OK]**

198. ~~Amtrak has entered into or assumed joint financial agreements related to Penn Station with both of its tenants and with numerous public entities or authorities operated by the state or local governments of New York and New Jersey including, among others, Metro North, which, like the LIRR, is a subsidiary of the Metropolitan Transportation Authority ("MTA"), and the Triborough Bridge and Tunnel Authority, the New York City Transit Authority and The Port Authority of New York and New Jersey.~~ *See* N.Y. Transp. Law § 219-C (McKinney 1975 & Supp. 1993); N.Y. Pub. Auth. Law §§ 552, 1201, 1263 (McKinney 1982 & Supp. 1993); N.J. Stat. Ann. § 32:1-4, 32:1-35.72 (West 1990). DeAngelo Dep. 185:4-186:4, 187:5-180:20; Gallagher Dep. 11:14-26:5; PXX 81; 82; 99; 100; 105; 114-126. For other government entities with whom Amtrak has contracted, *see generally* PXX 7; 61; 66-67; 76-77; 87-89; 93-97; 100; 125.

199. ~~In many instances, those agreements established long-term relationships between Amtrak and the contracting state entities involved. *Id.*~~

200. ~~Pursuant to those agreements, Amtrak:~~

- ~~is monitored and/or audited by the state entities involved;~~
- ~~receives funds from the state entities involved;~~
- ~~provides funds to the state entities involved;~~
- ~~shares costs, liabilities, and certain areas of Penn Station with the state entities involved; and~~

- ~~develops "improvements" jointly owned with the state entities involved.~~

See Gallagher Dep. 16:24-20:6, 32:38-33:24, 92:1-11; PXX 78 at 1; 79; 81-83; 96 at 29; 99; 100; 105; 114; 116; 119; 123.

201. ~~For example,~~ Amtrak, the MTA and the LIRR have entered into an agreement under which Amtrak and LIRR will jointly design, construct operate and maintain a modern system for the central control of train movements in and around Penn Station and the East River Tunnels. When the agreement was executed, the anticipated cost of the project was between $90 million and $120 million. The parties agreed to share the cost and ownership of the improvements. PXX 96 at 29; 99; 114; 124. **[OK]**

202. At the same time that it entered into its "traffic control" joint venture with the LIRR, Amtrak (1) leased the A level of Penn Station to LIRR for 99 years and (2) entered into a "facility agreement" pursuant to which it and LIRR will jointly use ~~Penn Station's operating~~ certain facilities for 99 years. DeAngelo Dep. 182:9-185:17, 187:13-188:7; PXX 81-82; 96 at 29; 99; 105. **[OK]**

203. Amtrak has entered into a "Northeast Corridor Services Agreement" with New Jersey Transit to improve service and equipment in the Northeast Corridor, ~~generally and in Penn Station specifically.~~ PX 83. ~~Amtrak's ability to operate reliably and effectively in the Northeast Corridor is "essential" to New Jersey Transit's operation.~~ PX 67 at 22. **[OK]**

204. ~~In both the LIRR and New Jersey Transit joint ventures, Amtrak has agreed to~~

- ~~jointly employ personnel with state entities, sharing salary expenses,~~
- ~~allow personnel of state entities to provide services on Amtrak property,~~
- ~~authorize its personnel (including persons responsible for clerical work, flag protection, electrical work, track, signal, communications, field engineering and~~

~~inspection work, security and other work) to perform work for state entities, with those entities reimbursing Amtrak for the expense of such work, and~~

~~— authorize its personnel to cooperate with state employees in matters that require cooperation including security, trash removal, maintenance, and preparation for special events (*e.g.*, the Democratic National Convention).~~

Bourque Dep. 12:12-25; Gallagher Dep. 16:24-20:6, 24:12-25:5, 32:11-33:24, 122:7-124:18; PXX 81-83; 99; 105; 114 at IV-E; 115; 118; 119; 121; 123; 126.

205. ~~Amtrak police will respond to calls for assistance by New Jersey Transit in Penn Station, where New Jersey Transit does not assign its own officers on a permanent basis. Gallagher Dep. 128:7 129:20,~~ **[See Deposition; No Foundation]**

206. Similarly, Amtrak and the State of New York jointly funded (paying 60 and 40 percent of cost, respectively) the "Westside Connection," a project which enabled direct connections between Amtrak's Northeast Corridor trains at Penn Station and trains for upstate New York and points west. PXX 7 at 11; 85 at 6; 96 at 22; 117. **[OK]**

207. ~~In addition to its joint ventures with state agencies and government corporations, Amtrak also has received from state agencies and government corporations various easements, leases and/or permits that (1) allow Amtrak to use the properties of those agencies, corporations and/or the general public, (2) allow those agencies, corporations and/or the general public to use Amtrak's properties. *See, e.g.*, PXX 81; 99; 100; 105; 116; 120; 125; DeAngelo Dep. 146:18 147:22. For example, Amtrak is party to "a variety of easements and cross easements and other legal arrangements" related to the New York subway system property that abuts Penn Station, including an easement which allows the public to walk from the subway to Penn Station and vice versa.~~ DeAngelo Dep. 12:22-13:15, 16:19-17:12. **[See Depo + obj]**

208. ~~When Amtrak grants such easements, leases and/or permits, it generally receives compensation "usually a lump sum, up front payment."~~ DeAngelo Dep. 179:5-12. **[See Depos + objections]**

209. ~~Because, as noted above (*supra* at ¶ 125), state and local governments are barred by federal statutes from collecting taxes from Amtrak relating to Penn Station (or other Amtrak property), those governments subsidize Amtrak's operation at the expense of their own budgets. 45 U.S.C. § 546(b); PX 56. For example, New York City assessed Amtrak's Penn Station property located in the City at $166,515,317. PX 56. At the City's stated tax rate, Amtrak, were it any ordinary nongovernmental for profit corporation, would have to pay to New York City a total of $17,813,808 in real estate taxes on Penn Station alone.~~ DeAngelo Dep. 136:3-10; PX 56.

New York, New York
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